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# **NAVAL POSTGRADUATE SCHOOL**

**MONTEREY, CALIFORNIA**

## **THESIS**

**JUDICIAL REVIEW: STATE SUPREME JUDICIAL  
VIEWS ON BALANCING CIVIL LIBERTIES AND PUBLIC  
SAFETY/SECURITY MEASURES DURING THE GLOBAL  
WAR ON TERROR**

by

Patty Allison Fairweather

March 2009

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**JUDICIAL REVIEW: STATE SUPREME JUDICIAL VIEWS ON BALANCING  
CIVIL LIBERTIES AND PUBLIC SAFETY/SECURITY MEASURES DURING  
THE GLOBAL WAR ON TERROR**

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Submitted in partial fulfillment of the  
requirements for the degree of

**MASTER OF ARTS IN SECURITY STUDIES  
(HOMELAND DEFENSE AND SECURITY)**

from the

**NAVAL POSTGRADUATE SCHOOL  
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## **ABSTRACT**

Political responses to terrorism in the United States and the international community have been to place limitations upon and/or to suspend civil liberties. Since constraining civil liberties may lead to the spread of terror, balancing the competing interests of individual civil liberties and public safety/security measures imposed by government in times of national emergency is essential to reducing terrorism and to the pursuit of peace. Constitutional courts both federal and state through the mechanism of judicial review serve to guard civil liberties against government encroachment. Yet, some scholars decry judicial review as counter-majoritarian, an illegitimate and undemocratic exercise in a representative democracy, while others laud judicial review as an essential function to advance peace, public participation in governing and legitimating democracy's quest to reduce terrorism.

This thesis seeks to transcend the debate over judicial review by exploring the views of State Supreme Court Justices on what factors they consider essential to consider when balancing the competing interests. It invites the reader to engage a global discourse. To participate in the political spaces, judges operate to accept that because judicial review offers an alternative to the sword, it is material and relevant to reducing terrorism and that by focusing on the signals, the justices send the public might respond adequately to preserve human dignity during the global war on terror and beyond.



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## I. INTRODUCTION

### A. CONSTRAINING CIVIL LIBERTIES AND THE SPREAD OF TERROR

A response to terrorism in the United States and internationally has been to place limitations upon and/or to suspend civil liberties,<sup>1</sup> including banning engagement in political activity and/or limiting the right to privacy and/or limiting the right to due process before a judicial forum.<sup>2</sup> Civil liberties in America refer to the expressed and implied protections afforded in her federal and state constitutions designed to maintain freedom from coercive governmental actions.<sup>3</sup> Research shows that when a government constrains liberties by withdrawing or foreclosing individual rights, terrorism spreads:<sup>4</sup>—where the legitimate grievances of a people go un-redressed by the seat of power—government, and rather than allow peaceful protest,<sup>5</sup> the government responds by

---

<sup>1</sup> Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York, NY: The Double Day Publishing Group, 2008), 199-200; Dalia Dassa Kaye, Federic Wehrey, Audra K. Grant, and Dale Stahl, “More Freedom, Less Terror? Liberalization and Political Violence in the Arab World,” California: RAND Corporation, JQ1850.A91M67, 2008, [http://www.rand.org/pubs/monographs/2008/RAND\\_MG772.pdf](http://www.rand.org/pubs/monographs/2008/RAND_MG772.pdf) (accessed December 1, 2008), 79-80; 100-102; 120-121; 141-142; 161.

<sup>2</sup> *Ibid.*, *Boumediene v. Bush*, No. 06-1195, slip op at 42-64, 553 U.S., 2008 WL 2369628 (June 12, 2008) (plurality) (Detainee Treatment Act’s Combatant Status Review Tribunal procedure for challenging enemy combatant status inadequate substitute for habeas relief); Adeno Addis, “Symposium: Extraordinary Power in Ordinary Times ‘Informal’ Suspension of Normal Processes: The ‘War on Terror,’” 87 *Boston University Law Review*, 323 (2007): 323-346; Harlan K. Ullman presentation on *Algeria’s Struggle Against Terrorism* presented at the Hearing before The Subcommittee on International Terrorism and Nonproliferation of the Committee On International Relations House of Representatives, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., Serial No. 109-10, (March 3, 2006), 19-20. Ullman discusses the horrors associated with the Algerian government’s use of violence and sustained suppression of freedoms as a primary means to eradicate terrorism that resulted in the death or disappearance of several thousands of Algeria’s law-abiding citizens.

<sup>3</sup> Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (England: Oxford University Press, 2006), 4-5.

<sup>4</sup> Dalia Dassa Kaye, Federic Wehrey, Audra K. Grant and Dale Stahl, “More Freedom, Less Terror? Liberalization and Political Violence in the Arab World,” 167-169; Dennis Pluchinsky, “Ethnic Terrorism: Themes and Variations,” in *The Unconventional Threat to Homeland Security*, Center for Homeland Defense and Security (Fall 2007), 36-37.

<sup>5</sup> *Ibid.*



imposing public safety and security measures (governmental acts designed to secure a sovereign against real and/or imagined threats),<sup>6</sup> which unduly burden liberties<sup>7</sup> or governmental acts that fail to recognize individual liberties for all equally.<sup>8</sup>

Since constraining liberties can lead to increased terrorism, it is imperative to the pursuit of peace that the competing interests of the right to privacy be free from unreasonable search and seizures, petition the courts, and counsel be appropriately balanced with public safety and security measures implemented via national security or homeland defense/security laws,<sup>9</sup> and strategies or policies.<sup>10</sup> Specifically, it means those laws, strategies and policies requiring state participation within the federal

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<sup>6</sup> Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, 4-5.

<sup>7</sup> See line of enemy combatant cases: *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp.2d 42, 49 (S.D.N.Y. 2003); *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Padilla*, 423 F.3d 386 (4th Cir. 2005); *Padilla v. Hanft*, 547 U.S. 1062 (2006); *Hamdi v. Rumsfeld*, 294 F.3d 598 (4th Cir. 2002); *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002); *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *al-Marri v. Wright*, 443 F. Supp. 2d 774 (D.S.C. 2006); *al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), rehearing en banc granted (August 22, 2007); *al-Marri v. Pucciarelli*, No. 06-7427, \_\_\_ F.3d \_\_\_, 2008 WL 2736787 (4th Cir. July 15, 2008) (en banc); see also, Pluchinsky, "Ethnic Terrorism: Themes and Variations," 36-37; Seth Jones and Martin Libicki, "How Terrorism Ends: Lessons for Countering Al Qaeda" Santa Monica, California: RAND Corporation, HV6431.j65, 2008, 17, <http://www.rand.org/pubs/monographs/MG741/> (accessed August 12, 2008).

<sup>8</sup> Moghaddam explains that Islamic fundamentalists oppose equality for women and democratic decision making for everyone. Fathali M. Moghaddam, *From the Terrorists' Point of View: What they Experience and Why they Come to Destroy* (Praeger Security International, Westport: Connecticut, 2006), 68.

<sup>9</sup> See, e.g., United and Strengthening America By Providing Appropriate Tools Required to Intercept And Obstruct Terrorism (USA PATRIOT ACT) Public Law 107-56; 107th Congress; *Authorization to Use Military Force (AUMF)*, Public Law 107-40, *U.S. Statutes at Large* 115 (2001); Authorization for the Use of Military Force Against Iraq (Washington, DC: Whitehouse, October, 2002), <http://www.whitehouse.gov/news/releases/2002/10/20021002-2.html> (accessed April 16, 2008); On July 31, 2008, President Bush amended executive order codifying the importance of Federal intelligence community collaboration with state, local and tribal intelligence communities and with the private sector "when undertaking the collection and dissemination of information and intelligence to protect the United States." The full text of the executive order can be viewed at: U.S. Intelligence Activities Executive Order 12333 as amended by EO 13284 (2003) EO 13355 (2004), 13470 (2008), <http://www.whitehouse.gov/news/releases/2008/07/20080731-2.html> (accessed January 27, 2009); "U.S. May Ease Police Spy Rules: More Federal Intelligence Changes Planned," *Washington Post*, August 16, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/15/AR2008081503497.html?nav=emailpage> (accessed August 17, 2008).

<sup>10</sup> Ibid., *The National Strategy for Information Sharing* (Washington, DC: White House, October 2007), <http://www.whitehouse.gov/nsc/infosharing/index.html> (accessed December 22, 2007).

information-sharing environments where detention, interrogation, and surveillance programs are challenged<sup>11</sup> and where laws, policies, or programs impede access to a judicial forum of competent jurisdiction.<sup>12</sup>

The federal judiciary plays a key role in mitigating the spread of terror.<sup>13</sup> As independent guardians of civil liberties and of the principles of separation of powers,<sup>14</sup> that is, principles of shared governing among the executive, legislative and judicial branches to provide checks and balances on governmental power,<sup>15</sup> the federal judiciary is chiefly responsible for balancing the competing interests of civil liberties and public safety and security measures particularly during national emergencies.<sup>16</sup> Although a state

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<sup>11</sup> Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*, 102-103 writes how extraordinary rendition “a means of extraditing criminal suspects from one foreign country to another outside of the recognized legal process” was used to advance torture of terror suspects; Law Professors’ Petition to Congress American Bar Association House Resolution 302 [http://www.abanet.org/op/greco/memos/aba\\_house302-0206.pdf](http://www.abanet.org/op/greco/memos/aba_house302-0206.pdf) (accessed February 1, 2008); James Risken and Eric Lichtblau, “Bush Lets U.S. Spy on Callers without Courts,” *New York Times*, December 16, 2005, [http://www.nytimes.com/2005/12/16/politics/16program.html?\\_r=1&scp=8&sq=secret%20surveillance&st=cse&oref=slogin](http://www.nytimes.com/2005/12/16/politics/16program.html?_r=1&scp=8&sq=secret%20surveillance&st=cse&oref=slogin) (accessed May 12, 2007).

<sup>12</sup> Ibid., see also, line of enemy combatant case *supra* at fn 7.

<sup>13</sup> *Boumediene v. Bush*, No. 06-1195, slip op at 34-36; *Hamdi*, 542 U. S. at 536.

<sup>14</sup> Sandra Day O’Connor wrote in *Hamdi v. Rumsfeld*, 542 U. S. at 536 (plurality) (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake” quoting *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (it was “the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental power into three coordinate Branches is essential to the preservation of liberty.”); see also Keith E. Whittington, ““Interpose Your Friendly Hand:” Political Supports for the Exercise of Judicial Review by the United States Supreme Court,” *American Political Science Review* 99, no. 4 (November 2005): 587, <http://www.apsanet.org/imgtest/APSRRNov05Whittington.pdf> (accessed August 18, 2008).

<sup>15</sup> James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, no. 74 (New York: Penguin, 1987), 440-442.

<sup>16</sup> Federal jurisdiction flows from Article III of the U.S. Constitution vesting the Federal court system with full judicial power—that is final decision-making authority over certain causes of actions including all habeas corpus petitions made pursuant to the United States Constitution. Author unknown, “Comparing Federal and State Court Systems,” <http://www.uscourts.gov/outreach/resources/comparefedState.html> (accessed December 20, 2007).

judiciary would not have final decision-making authority over decisions made pursuant to the Federal Constitution,<sup>17</sup> since the terror attacks of September 11, 2001, their views on balancing the competing interests are especially relevant.

Consider Executive Order 12333<sup>18</sup> and the National Strategy for Information Sharing designed to enhance intelligence information sharing among the state, local tribal and private sector with that of the federal intelligence community.<sup>19</sup> Homeland defense and security (HLDS) professionals agree, implementation of the strategy requires drawing heavily from the resources of state and local law enforcement.<sup>20</sup> An avenue to state court jurisdiction may open, where shared intelligence leads to a state request for preventative detention or the issuance of a gubernatorial executive order to detain terror suspects.

## **B. IMPERATIVES OF STATE JUDICIAL VIEWS ON BALANCING THE COMPETING INTERESTS**

This thesis will not examine the basis on which a state supreme court would exercise jurisdiction over a terrorism case; it assumes that state and local law

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<sup>17</sup> Ibid., See *Michigan Department of Police v. Sitz*, 496 U.S. 444, 448-455 (1990) where the U.S. Supreme Court held that state police random sobriety checkpoints did not violate the federal constitution's prohibition against unreasonable search and seizures. By contrast, the Michigan State Supreme Court in construing that state's constitutional prohibition against unreasonable search and seizures under Article I, Section 11 determined the state's sobriety checkpoints violated the prohibition against unreasonable search and seizures. *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 186-187 (Minn. 1994) (“[d]eclining to follow *Sitz*, we reaffirmed on the basis of our state constitution the long-standing requirement in Minnesota that police need an objective individualized articulable suspicion of criminal wrongdoing before making an investigative stop.”)

<sup>18</sup> U.S. Presidential “Executive Order: Further Amendments to Executive Order 12333, United States Intelligence Activities,” July 31, 2008 Section 2 Part 1.1(f) state, local, and tribal governments are critical partners in securing and defending the United States from terrorism and other threats to the United States and its interests. Our national intelligence effort should take into account the responsibilities and requirements of state, local, and tribal governments and, as appropriate, private sector entities, when undertaking the collection and dissemination of information and intelligence to protect the United States. <http://www.whitehouse.gov/news/releases/2008/07/20080731-2.html> (accessed August 12, 2008).

<sup>19</sup> The National Strategy for Information Sharing at 11, 17-20, [http://georgewebush-whitehouse.archives.gov/nsc/infosharing/NSIS\\_book.pdf](http://georgewebush-whitehouse.archives.gov/nsc/infosharing/NSIS_book.pdf) (accessed August 8, 2008).

<sup>20</sup> Jones and Libicki, “How Terrorism Ends: Lessons for Countering Al Qaeda,” 18-19, 27-30; William Forsyth, *State and Local Intelligence Fusion Centers: An Evaluative Approach in Modeling a State Fusion Center* (Master's Thesis, Naval Postgraduate School, Monterey, CA, September 2005), 5-6, 62; Christopher J. Cleary, *Strategy for Local Law Enforcement Agencies to Improve Collection, Analysis, and Dissemination of Terrorist Information* (Master's Thesis, Naval Postgraduate School, Monterey, CA, March 2006), 12.

enforcement and intelligence actions taken consistent with the National Strategy for Information Sharing and pursuant to applicable law would serve as the basis for such jurisdiction. The research aims are to ascertain through qualitative research methodology those factors State Supreme Court justices (State Supreme Court Justices or the Supremes) view as essential in determining the appropriateness of suspending or limiting civil liberties during national emergencies and how those factors should be balanced and why. In addition, they identify judicial views on whether it is ever appropriate to suspend or limit civil liberties in an effort to defeat terrorism, and if yes, to what degree, under what circumstances and for how long.

Identifying factors State Supreme Court justices view as essential to balancing the competing interests appropriately are of special importance because geopolitically<sup>21</sup> State Supreme Court justices are proximate to the locus of HLDS state and local law enforcement and intelligence activities that might give rise to a cause of action. Judicial proximity to the locus of HLDS activities provides an opportunity for judicial oversight, informed by the unique character of each individual state, its residents including U.S. citizens, and non-U.S. citizens: U.S. nationals, legal permanent residents and aliens, over governmental action. Further, because State Supreme Court justices in construing a State Constitution may apply heightened protection of civil liberties,<sup>22</sup> proximity matters.

However, some scholars challenge the notion that constitutional courts are relevant in or to American democracy,<sup>23</sup> particularly decisions relating to war.<sup>24</sup> They do not agree judges are equipped to “produce fundamental decisions and actions that shape

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<sup>21</sup> Geopolitical refers to a combination of political and geographic factors relating to something (as a State or particular resources). See Merriam-Webster’s online dictionary: <http://www.merriam-webster.com/dictionary/geopolitics> (accessed August 18, 2008).

<sup>22</sup> In interpreting a state constitution, the state court can establish a “higher” ceiling of rights for individuals than a federal court would provide in interpreting the federal constitution. *Michigan Department of Police v. Sitz*, 496 U.S. 444, 1990; *Sitz v. Michigan Department of Police*, 193 Mich. App. 690 (1993).

<sup>23</sup> Jeremy Waldron, “The Core of the Case against Judicial Review,” 1348-1353, 1363. <http://www.law.harvard.edu/news/2008/05/Waldron.pdf> (accessed August 5, 2008); Mark V. Tushnet, *Taking the Constitution Away from the Courts* (New Jersey: Princeton University Press, 1999), 154.

<sup>24</sup> John C. Yoo, “Judicial Review and the War on Terrorism,” [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=461721b](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=461721b) (accessed August 7, 2008), (“unlike the legislative process, there is no clear, precise procedure that governs decisions on war”), 5.

and guide”<sup>25</sup> the behavior of the public and private sector to promote public value: enhance life liberty and the pursuit of happiness for all while fostering a more perfect union,<sup>26</sup> with a steady, respected and friendly hand.<sup>27</sup> The results of this research of judicial views on balancing competing interests during the global war on terror (GWOT)<sup>28</sup> and beyond seeks to inform core theoretical concepts challenging state judicial governance<sup>29</sup> and to highlight the Supremes’ views and judicial review’s material relevance<sup>30</sup> to democracy’s quest to reduce and defeat terrorism.

### C. OVERVIEW OF THE RESEARCH

The research will highlight the important strategic function state judicial review can play in coordinating public and private efforts to reduce the spread of terror. Moreover, the research will serve as a new source from which the academic, legal, and political domains may transcend traditional debates regarding the applicability of the historical framework that characterizes the art of government,<sup>31</sup> to state judicial review during the GWOT, namely theoretical arguments against judicial review.

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<sup>25</sup> John M. Bryson, *Strategic Planning for Public and Nonprofit Organizations: A Guide to Strengthening and Sustaining Organizational Achievement*, 3<sup>rd</sup> edition (San Francisco CA: Jossey-Bass, 2004), 6; see also, Annie Pye, “Leadership and Organizing Sensemaking in Action,” *Leadership* 1, no. 1 (2005): 32.

<sup>26</sup> Sharing the benefits of strategic planning, Bryson invokes the Constitution “In the United States, creating public value means enhancing life, liberty, and the pursuit of happiness for all while fostering a more perfect union.” Bryson, *Strategic Planning for Public and Nonprofit Organizations: A Guide to Strengthening and Sustaining Organizational Achievement*, 8.

<sup>27</sup> Keith E. Whittington, ““Interpose Your Friendly Hand:” Political Supports for the Exercise of Judicial Review by the United States Supreme Court,” 586.

<sup>28</sup> In response to the 9/11 attacks, President Bush signaled a national emergency uttering the words “We’re at war,” characterized it as global in nature, and resolved to continue it “until every terrorist group of global reach has been found stopped, and defeated.” George W. Bush, President of the U.S., *Address to a Joint Session of Congress and the American People* (Washington, DC: White House, September 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (accessed March 20, 2008).

<sup>29</sup> For purposes of this thesis, judicial governance means the theoretical activity of judicial review, which is a constitutional court’s power to annul legislative or executive actions deemed to violate the Constitution.

<sup>30</sup> For purposes of this thesis, material means pertinent and necessary and relevance means germane.

<sup>31</sup> The art of government refers to the interplay of sovereignty, the supremacy of laws, and public participation in the disposition of goods and services for the common good of the people.

Chapter II sets out the qualitative research methodology and the grounded theory approach chosen by the researcher to guide the researcher through data gathering and analysis.

Chapter III provides an overview of literature on theories of judicial review and non-judicial review, and on the material relevance of judicial review as a strategic mechanism for coordinating public participation in the political spaces judges operate when balancing competing interest during the GWOT and further.

Chapter IV documents justification for interviewing Chief Justice Joseph R. Weisberger (Ret.) of the Rhode Island Supreme Court. It also invites the reader to participate in a series of three (3) interviews conducted with the Chief Justice. During the interviews, the Chief Justice reveals his views on, inter alia, the strategic function state judicial review can have in democracy's quest to reduce the spread of terror and he validates key factors necessary to balancing the competing interests during the GWOT that were identified from a survey (copy attached) submitted to 55 State Supreme Court justices.

Chapter V provides concluding thoughts on judicial review as a mechanism for leading public participation in the complex world of HLDS<sup>32</sup> as well as implications for future research.

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<sup>32</sup> For a comprehensive discussion on leading in the complex world of homeland defense and security, see Nola Joyce, *Can You Lead Me Now? Leading in the Complex World of Homeland Security* (Master's Thesis, Naval Postgraduate School Monterey, CA, September 2007).

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## II. METHODOLOGY FOR DISCOVERING JUDICIAL VIEWS

To answer the research problem of discovering the views of the State Supreme Court on balancing competing interests, the researcher invited 55 State Supreme Court justices, including Chief Justice Weisberger, to complete, voluntarily, a confidential survey.<sup>33</sup> The research aims to identify through qualitative research methodology, factors considered essential to balance when determining the appropriateness of suspending or limiting civil liberties during national emergencies and how those factors should be balanced and why. In addition, the research aims to identify judicial views on whether it is ever appropriate to suspend or limit civil liberties in an effort to reduce/defeat terrorism and if yes, to what degree, under what circumstances and for how long. Also, as importantly, the research seeks to inform core theoretical concepts for and against judicial review and to highlight the imperatives of state judicial review as a legitimate strategy for coordinating public participation in the political spaces judges operate when interpreting/creating constitutional law, and to public value, as well as to democracy's quest to reduce terrorism.

### A. QUALITATIVE METHOD

Gail Fann Thomas explains in her lecture *Research Methods: Qualitative Data Analysis* the benefits of qualitative research methodologies, benefits that permit the researcher to study more deeply human behavior, and the political world by 1) observing actual behavior and/or 2) by questioning informants. The researcher selected the survey as the tool for exploring judicial views in their political world because of the impediments to the actual observation or interviewing of 55 justices. Data gathering via the survey has had the greatest potential for researcher access to the story of a multitude of justices. Moreover, in-person interviewing of Chief Justice Weisberger as well as the researcher's previous observations, having served as a law clerk to the Chief Justice from 1997-1999, satisfies the dual reach of qualitative research: actual observation and

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<sup>33</sup> Sources for the survey questions include certain opinions of the United States Supreme Court and Posner's, *Not a Suicide Pact: The Constitution in a Time of National Emergency*.



questioning for data gathering purposes. The survey and the series of interviews provided the researcher with the opportunity to employ analytic strategies associated with the grounded theory approach said to benefit Mode 2 research, which is concerned with diminishing the space between academia and practice domains.<sup>34</sup> In this thesis, the researcher explores diminishing the space between theoretical notions of judicial review on balancing competing interests and the practice domain of judicial review on balancing competing interests for purposes of coordinating public participation in the political spaces judges operate when interpreting/creating constitutional law, advancing public value, and legitimating democracy's quest to reduce terrorism.

## **B. GROUNDED THEORY APPROACH**

The grounded theory approach falls under the umbrella of qualitative research and is a complex iterative process used to develop theory about issues of interest to researchers that also has practical usefulness to society.<sup>35</sup> As an initial step in the grounded theory approach, the researcher typically generates questions related to the issues of interests to guide data gathering. In this instance, researcher developed 30 questions for submission via a survey to 55 State Supreme Court justices. The questions informed but did not serve solely as the interview questions asked of the Chief Justice.

While reviewing the data gathered, from the survey and the interviews, the researcher employed key analytic strategies first to identify common core theoretical concepts and categories, and second, to identify conceptual links among survey and interview results and the data gathered from other sources. The strategies are as follows.<sup>36</sup>

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<sup>34</sup> Karen Locke, *Grounded Theory in Management Research* (Thousand Oaks, CA: SAGE, 2001), 170.

<sup>35</sup> Ibid., Gail Fain, "Research Methods Knowledge Base: Qualitative Approaches," <http://www.socialresearchmethods.net/kb/qualapp.php> (accessed May 8, 2008).

<sup>36</sup> Locke, *Grounded Theory in Management Research*, 170; Fain, "Research Methods Knowledge Base: Qualitative Approaches."

Coding:	categorizing and describing details about the data gathered
Memoing:	memorializing in writing researcher thoughts and ideas generated as part of the data review for additional analysis
Diagramming	developing graphs, charts maps for data sense-making of emerging theoretical concepts

To test the adequacy of the theoretical concepts and categories identified through the interviews and survey data and the concept of judicial review as a strategic function for coordinating public participation in the political spaces judges operate when interpreting/creating constitutional law, for advancing public value and for legitimating democracy's quest to reduce terrorism, the researcher utilized three (3) principles. First, theoretical sampling, the researcher selected data sources that provided information relevant to existing theoretical concepts and categories at issue when balancing the competing interests especially, but not exclusively during national emergencies and concepts at issue concerning judicial review's material relevancy to reducing terrorism in a democracy. Second, triangulation requiring the assessment of different sources of data collected. After transcribing and coding the interviews, the researcher expanded or contracted the concepts or categories identified by comparing them with those identified from the coded survey results. This process permitted the researcher to test not only the adequacy of survey and interview identified theoretical concepts or categories, but the researcher's understanding of them as well. Next, the researcher compared identified categories and concepts with the literature review, and developed three hypotheses to guide the reader's participation in the interviews, as well as the researcher's analysis of the data, and concluding thoughts. Lastly, having reached the third principle, theoretical saturation—diminished returns on finding new data, the researcher offers implications for further research. This iterative process informs core theoretical concepts for and against judicial review and highlights the imperatives of state judicial review as legitimate strategy to coordinate public participation, advance public value and for democratic leading during the GWOT and beyond.

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### III. REVIEWING THE LITERATURE

#### A. THE GWOT AND JUDICIAL REVIEW

Judicial balancing of competing interests during the GWOT has proven particularly challenging. One clear objective of terrorists is to shake the American psyche, to cause a paralyzing fear through sustained threats of violence and acts of violence<sup>37</sup> that fuels a collective belief that when it comes to securing personal and community safety, the American system of government is wounded, diseased, impotent; utterly incapable of doing anything to protect the citizenry.<sup>38</sup> Indeed, in such a diseased state of being, the political branches of government have operated from a center of fear and panic,<sup>39</sup> seeking to cure itself through rearrangement; the political branches nearly embraced authoritarianism by restricting judicial power to review legislative and executive actions for constitutional sufficiency, even where the cures denied liberty.<sup>40</sup>

Consider the creation of Combatant Status Review Tribunals, a three-panel board of military officers from the Department of Defense, as opposed to the judiciary, were authorized to decide the status of persons detained as terror suspects. The detainees were denied habeas corpus, denied access to counsel, and denied access to classified evidence, and with that, an opportunity to mount a reasonable defense.<sup>41</sup> In addition, the government enjoyed a rebuttable presumption in its favor. These experimental

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<sup>37</sup> Bruce Bongar, “The Psychology of Terrorism: Defining the Need and Describing the Goals,” in *Psychology of Terrorism*, ed. Bruce Bongar, Lisa M. Brown, Larry E. Beutler, James N. Breckenridge, and Philip G. Zimbardo (New York: Oxford University Press, 2007), 4-6.

<sup>38</sup> Addis, “Symposium: Extraordinary Powers in Ordinary Times ‘Informal’ Suspension of Normal Processes,” 323-346. Addis argues that America’s failure to balance adequately competing interests in her efforts to defeat terror is akin to an auto-immunity disease “a medical condition that emerges when an organism compromises its own integrity by perceiving a part of itself as being foreign and attacking it to eliminate it.” Zbigniew Brzezinski and Brent Scowcroft, “America and the World,” moderated by David Ignatius, (New York: Basic Books, 2008) (“9/11 is not only a tactical success for Osama but a self-inflicted strategic wound for the United States”), 21.

<sup>39</sup> Addis, “Symposium: Extraordinary Powers in Ordinary Times ‘Informal’ Suspension of Normal Processes,” 323-346; Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*, 1-10; Zbigniew Brzezinski, “Terrorized by ‘War on Terror’: How a Three-Word Mantra Has Undermined America,” *Washington Post Op-Ed*, March 25, 2007.

<sup>40</sup> *Ibid.*, see also line of enemy combatant cases *supra* fn 7.

<sup>41</sup> *Boumediene v. Bush*, No. 06-1195, slip op at 42-64.

constraints upon liberty arose in direct response to the horrific terrorist attacks of 9/11, and included secret surveillance,<sup>42</sup> prolonged detainment at military installations<sup>43</sup> interrogation and torture of terror suspects<sup>44</sup> and continued until judicial review checked those constraints that failed to abide by the limitations imposed by the Constitution under the principles of separation of powers.

The Founders of the American republic proclaimed separation of powers as essential, and with that, the necessity of judicial review as a guide to ensure the appropriate balancing of competing interests. Hamilton in the Federalist Papers No. 78 argued that review performed by an independent judiciary is a necessary power to endow the judiciary with in order to secure the Union, preserve peace, and to protect the interests of the people from an overreaching government.<sup>45</sup> Irrespective of historic sanctioning, critics of judicial review accost it as unauthorized, unnecessary and undemocratic.

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<sup>42</sup> For discussions addressing concerns over electronic surveillance activity see the American Bar Association House Resolution 302, [http://www.abanet.org/op/greco/memos/aba\\_house302-0206.pdf](http://www.abanet.org/op/greco/memos/aba_house302-0206.pdf) (accessed February 1, 2008); Elizabeth B. Bazan, Gina Marie Stevens, Brain T Yeh ,CRS Report RL 33424, *Government Access to Phone Calling Activity and Related Records: Legal Authorities* (2007) Elizabeth B. Bazan, CRS, Report RL 34279, *The Foreign Intelligence Surveillance Act: A Brief Overview of Selected Issues* (2007).

<sup>43</sup> In *Rasul v. Bush*, 542 U.S. 466, 552 (2004) the U.S. Government challenged the jurisdiction of the federal court to hear habeas petitions of detainees arguing the detainees were not citizens of the United States and they were detained outside the territory of the United States at Guantanamo Bay. The court rejected the government's argument reasoning that the detainees: "are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with or convicted of wrongdoing; and for more than two years, they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control."

<sup>44</sup> Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*, 140-181.

<sup>45</sup> Madison, Hamilton, and Jay, "Federalist Papers," 440-442.

## B. THE CASE AGAINST JUDICIAL REVIEW

Theorists Jeremy Waldron and Mark Tushnet contend that judicial review is unnecessary,<sup>46</sup> at best and democratically illegitimate,<sup>47</sup> at worst. Resting on Alexander Bickel's<sup>48</sup> counter-majoritarian theory that judicial review permits unelected or otherwise unaccountable officials—judges, to “tell[] the people’s elected representative that they cannot govern as they like,”<sup>49</sup> Waldron and Tushnet develop provocative arguments against judicial review as inveighing against popular constitutionalism.

Popular Constitutionalism advances the idea that “we all ought to participate in creating Constitutional law through our actions in politics.”<sup>50</sup> For Waldron, judicial review endangers popular constitutionalism because “. . . it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.”<sup>51</sup> Similarly, but refraining from going as far as Mary Becker's<sup>52</sup> charge that judicial review and the Constitution, itself, adversely

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<sup>46</sup> Mark V. Tushnet, *Taking The Constitution Away From The Courts*, (New Jersey: Princeton University Press, 1999), 154 (“[d]oing away with judicial review would have one clear effect [i]t would return all constitutional decision making to the people acting politically.”); Noting that United States senators may raise a constitutional point of order regarding any bill under consideration, Tushnet also challenges the idea that constitutional courts are the only body equipped to place constraints on political branches through review of legislation for constitutionality. Mark V. Tushnet, “Non-Judicial Review,” [http://www.law.harvard.edu/students/orgs/jol/vol40\\_2/tushnet.pdf](http://www.law.harvard.edu/students/orgs/jol/vol40_2/tushnet.pdf) (accessed September 11, 2008), 454-458.

<sup>47</sup> Jeremy Waldron, argues “judicial review of legislation is inappropriate as a mode of final decision making in a free and democratic society,” he admits, however, that where democratic and legislative institutions are not in “good shape so far as political equality is concerned,” the arguments against judicial review do not go through. “The Core of the Case against Judicial Review,” 1348-1353, 1401-1402. <http://www.law.harvard.edu/news/2008/05/Waldron.pdf> (accessed August 5, 2008).

<sup>48</sup> Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2d edition (New Haven: Yale University Press, 1986), 16-17. (“[J]udicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act. . . it thwarts the will of representatives of the actual people of the here and now. . .”).

<sup>49</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Massachusetts: Harvard University Press, 1980), 4.

<sup>50</sup> Tushnet, *Taking the Constitution Away from the Courts*, 157.

<sup>51</sup> Waldron, “The Core of the Case against Judicial Review,” 1353.

<sup>52</sup> See generally, Mary Becker, “The Politics of Women’s Wrongs and the Bill of “Rights:” A Bicentennial Perspective,” 59 U. Chi. L. Rev. 453 (1992): 453-517; Mary Becker, “Towards a Progressive Politics and a Progressive Constitution,” 69 Fordham L. Rev. 2007 (2001): 2008-2056; Robin West, *Progressive Constitutionalism: Reconstruction the Fourteenth Amendment* (Durham: Duke University, 1994).

impacts the distribution of justice and social rights.<sup>53</sup> Robin West has also called for limiting the reach of the judiciary, preferring that the political branches as opposed to constitutional courts vindicate commitments about rights.

Erwin Chemerinsky, a supporter of judicial review, opines that for the popular constitutionalist, then, popular constitutionalism requires the elimination or scaling back of judicial review to demonstrate a “commitment to majoritarianism . . . a deference to all elected officials at all levels of government” who are elected to represent the will of the people.<sup>54</sup>

In short, popular constitutionalists appear to share Ran Hirschl’s view: judicial review represents a constitutional experiment that has failed, that the activity of judicial review has created a *Juristocracy* due to the transfer of “an unprecedented amount of power from representative institutions to judiciaries.”<sup>55</sup> If Hirschl is correct and the central function of popular constitutionalism is to preserve America’s representative democracy as Hirschl envisions the Framers of the Constitution intended, what is wrong, if anything, with eliminating judicial review?

Undoubtedly, the central function of popular constitutionalism is democratic. It champions sovereign rule through public participation in representative governing, through which the will of the public majority exists in laws that provide for the disposition of goods and services for the benefit of all. However, the central function of popular constitutionalism is also its central problem. Historically, in the United States, majority rule left unchecked by the essential purpose of judicial review, the annulment of

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<sup>53</sup> Becker, “The Politics of Women’s Wrongs and the Bill of “Rights:” A Bicentennial Perspective;” Becker, “Towards a Progressive Politics and a Progressive Constitution;” West, *Progressive Constitutionalism: Reconstruction the Fourteenth Amendment*; Linda C. McClain and James E. Fleming, “Constitutionalism, Judicial Review, and Progressive Change, (2005), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=672382](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=672382) (accessed September 15, 2008), 19.

<sup>54</sup> Erwin Chemerinsky, “In Deference of Judicial Review: The Perils of Popular Constitutionalism,” 673 *University of Illinois Law Review*, 690 (2004): 677-679.

<sup>55</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004), 1.

legislative or executive actions deemed to violate the Constitution, resulted in tyranny of the majority.<sup>56</sup> It shielded silence around state sanctioned systemic persecution of racial, ethnic, religious minorities and women.

Chief Justice Taney's *Dred Scott* decision is but one example. The decision embraced popular constitutionalism to exalt the chimerical principle of natural law—the notion of a life ordered “according to nature, promulgated by God solely through human reason.”<sup>57</sup> Taney used natural law to “prove” the inferiority of blacks, deny blacks citizenship, and cement the right of the white majority to own slaves as higher than any constitutional sanction.<sup>58</sup> He reasoned that slavery was a natural institution, that the “African race was ‘made subject’ to ‘white dominion’ by ‘the order of nature.’”<sup>59</sup> For Taney, slavery reflected a “divinely ordained distribution of [white] power and responsibility [over blacks]” akin to a natural hierarchical power structure of ant and beehives.<sup>60</sup> Taney did not rely on the Constitution to interpret the fugitive slave law and void it; rather he relied on the darkest side of popular constitutionalism to elevate natural law above the Constitution. By so doing, he did not taint the integrity of the Constitution; he issued a decision that was not counter-majoritarian, and was widely popular because it permitted elected officials to preserve American terrorism against blacks and the majority's sovereignty and sense of safety and security by detaining blacks in a perpetual state of denied access to civil liberties.<sup>61</sup> He also galvanized theoretical debates and

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<sup>56</sup> For a discussion of the view that “tyranny of the majority” is a misnomer, see Waldron, *The Core of the Case against Judicial Review*, 1395-1401.

<sup>57</sup> *Black's Law Dictionary*, 6th ed.

<sup>58</sup> Ely, *Democracy and Distrust: A Theory of Judicial Review*, 48-54; *Dred Scott v. Sanford*, 60 U.S. 393 (1857); Samuel Tyler, *Memoir of Roger Brooke Taney* (Baltimore: John Murphy & Co., 1872), 579.

<sup>59</sup> *Ibid.*, Gregg D. Crane, *Race, Citizenship, and Law in American Literature* (United Kingdom: Cambridge University Press, 2002), 148-157.

<sup>60</sup> Crane, *Race, Citizenship, and Law in American Literature*, fn 60.

<sup>61</sup> Cornel West, *Hope on a Tightrope: Words & Wisdom Cornel West* (New York: NY Smileybooks, 2008), 14-15.



analysis of judicial review through the prism of popular constitutionalism in ways that he may not have imagined,<sup>62</sup> but are particularly relevant to balancing the competing interests during the GWOT.<sup>63</sup>

### C. BALANCING JUDICIAL REVIEW AND POPULAR CONSTITUTIONALISM

Is judicial review counter-majoritarian? Put another way, does the practice of judicial review inveigh against the positive democratic tenets of popular constitutionalism—public participation in creating public value: enhancing life, liberty, and the pursuit of happiness for all while fostering a more perfect union? John Hart Ely explores the case for arguing judicial review does not inveigh against popular constitutionalism and is not counter-majoritarian, offering that “since the Constitution itself was submitted for and received popular ratification. . . . judges do not check the people, the Constitution does, which means the people are ultimately checking themselves.”<sup>64</sup> He describes two (2) theoretical concepts of judicial review, interpretivism and noninterpretivism that support popular constitutionalism—civic participation in creating public value, as follows.

Interpretivism calls for judicial reliance on the provisions within the four (4) corners of the Constitution to interpret and apply legislative and executive actions in balancing competing interests, whereas, non-interpretivism calls for judicial reliance on outside factors in addition to the provisions within the four corners of the Constitution. Since interpretivism requires judges to “confine themselves to enforcing norms that are stated expressly in the Constitution,” arguably, it is not counter-majoritarian but rather is consistent with representative democracy.<sup>65</sup> Also, upon further analysis, because as Ely

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<sup>62</sup> See, Crane, *Race, Citizenship, and Law in American Literature*, explaining how in the wake of *Dred Scott* lawyers and literary figures fought to interpret and create constitutional law reflecting a moral consensus that slavery was evil.

<sup>63</sup> David Cole, “Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crises,” Georgetown University Law Center Public Law & Legal Theory Working Paper No. 519442, Michigan Law Review, 101, no. 8 (August 2004), <http://ssrn.com/abstract=519442> (accessed August 18, 2008).

<sup>64</sup> Ely, *Democracy and Distrust: A Theory of Judicial Review*, 8.

<sup>65</sup> *Ibid.*, 1-2.

discloses several constitutional provisions, it invites the justices to look beyond its four (4) corners<sup>66</sup> when making difficult substantive choices among competing fundamental values and principles.<sup>67</sup> The dichotomy between interpretivism and non-interpretivism melts away, and with it, the notion that judicial review undermines public participation in creating and interpreting constitutional law and creating public value for all becomes suspect.

Ely's post *Dred Scott* judicial review, looks to the Constitution and locates permission in its express provisions to imply "a line of growth [] intended, [to] identify the sorts of evils against which the provision was directed and to move against their contemporary counterparts."<sup>68</sup> Progressing, slowly, post *Dred Scott* judicial review did not examine the behavior of "ants and beehives" for instruction on protecting civil liberties during wartime.<sup>69</sup> Rather, with respect for popular constitutionalism's purpose, civic participation in creating public value for all or more succinctly democratic liberalization, judicial review examines the political process on both the federal and state levels, "which is where values are properly identified, weighed, and accommodated . . . [to ensure the process is] open to those of all viewpoints on something approaching an equal basis."<sup>70</sup> Even so, the theoretical controversy continues in the post 9/11 era of the GWOT and presses against the perceived dangers of judicial review to democracy.

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<sup>66</sup> Ely, *Democracy and Distrust: A Theory of Judicial Review*, 13-14.

<sup>67</sup> Ibid., Quoting Alexander Bickel, Ely writes "The Court is 'an institution charged with the evolution and application of society's fundamental principles,'" and its "constitutional function," accordingly, is "to define values and proclaim principles," 43.

<sup>68</sup> Ely, *Democracy and Distrust: A Theory of Judicial Review*, 13-14; Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crises," 2566-2567.

<sup>69</sup> Although as recent as 1944, interpretations of natural law permitted America to evacuate and detain American citizens of Japanese descent, the United State Supreme Court, through its power of judicial review, has since sounded an alarm that the use of racial and ethnic profiling in preventative detention determinations would be met with strict scrutiny. Compare *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J. dissenting) (arguing that the principle underlying the *Korematsu* decision "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need"); and *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (comparing *Korematsu* to the *Dred Scott* decision) with the line of enemy combatant detainee cases.

<sup>70</sup> Ely, *Democracy and Distrust: A Theory of Judicial Review*, 74; Crane *Race, Citizenship, and Law in American Literature*, 25.

## 1. Non-Judicial Review: A Process for Balancing Competing Interests

Holding tight to the notion that judicial review is illegitimate, Tushnet suggests non-judicial review should replace judicial review by the courts. He argues that, unlike non-judicial institutions, i.e., members of the United States Senate, judges have “a disinterested desire to interpret the Constitution correctly” because they do not have “an interest in satisfying the demands of some constituency in a position to affect the judge’s tenure in the job.”<sup>71</sup> For Tushnet, judges lack incentives, and are therefore, ill suited for the job of balancing competing interests. By contrast, “non-judicial institutions can balance competing constitutional interests . . . because they have incentives guiding them toward balancing.”<sup>72</sup> The incentives are not necessarily associated with political expediency—re-election, Tushnet assures, but rather “as reflecting *considered constitutional judgment* . . . .”<sup>73</sup> Moreover, Tushnet argues with company<sup>74</sup> since the Constitution is not a suicide pact<sup>75</sup> that even during emergency periods, where the threat to civil liberties is heightened, the judgment of the political branches on the propriety of the imposition of extra-constitutional emergency measures, rather than the judgment of the judiciary governs.<sup>76</sup>

Tushnet’s advocacy for protecting democracy from so-called disinterested, disincentivized judges devoid of considered constitutional judgment necessary to balance competing interests correctly has at its core, non-judicial review, and relies on a perceived lack of judicial patriotism and judicial review’s lack of material relevancy to democratic sustainability and success. So, for Tushnet, protecting democracy requires

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<sup>71</sup> Tushnet, “Non-Judicial Review,” 455-456.

<sup>72</sup> *Ibid.*, 466-467, 491-492.

<sup>73</sup> *Ibid.*, 467.

<sup>74</sup> Tushnet, “Defending Korematsu?: Reflections on Civil Liberties in Wartime,” 2003 Wisconsin Law Review, 253; Oren Gross, *Chaos and Rules: Should Responses to Violent Crimes Always Be Constitutional?*, 112 Yale Law Journal 1011 (2003): 1015-1134.

<sup>75</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

<sup>76</sup> Tushnet, “Non-Judicial Review,” 455-456, 466-467.

casting balancing of the competing interests out of bounds of judicial review and into the territory of the political branches.<sup>77</sup> Tushnet concludes his essay by inviting scholars to conduct more research to determine whether judicial review is truly necessary.<sup>78</sup>

## **2. Judicial Review: A Process for Balancing Competing Interests**

Answering Tushnet's call for more research, Samuel Issacharoff writes American "courts have developed a process-based institutionally-oriented framework for examining the legality of governmental action" during wartime,<sup>79</sup> as opposed to a values or rights based approach, which necessitates a consideration of "what the content of the underlying rights ought to be" when balancing competing interests during wartime.<sup>80</sup> Issacharoff seems to suggest like Tushnet, that judges have a disinterested distance with respect to balancing competing interests, but unlike Tushnet, *not* because they lack incentive, considered constitutional judgment to balance competing interests correctly or lack of material relevancy to democracy.

For Issacharoff, the process-based, institutionally oriented approach adopted by the courts for examining the legality of government action during wartime is politics reinforcing,<sup>81</sup> and hence, judicial review advances democracy because the process-based approach reflects the courts acceptance of "joint political judgment of how liberty and security tradeoffs ought to be made."<sup>82</sup> In other words, where politically accountable institutions—the legislative and/or executive branches, have spoken the courts, "shift the responsibility [of balancing the conflict over rights and security during times of national emergencies] away from themselves and toward the joint action of the most democratic

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<sup>77</sup> See Posner, questioning whether judges know enough about the consequences of particular measures taken for the protection of national security to be able to strike a proper balance, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, 35-37.

<sup>78</sup> *Ibid.*, 491-492.

<sup>79</sup> Samuel Issacharoff, "Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime," [www://media-server.amazon.com/exec/drm/amzproxy.cgi](http://media-server.amazon.com/exec/drm/amzproxy.cgi) (accessed September 6, 2008).

<sup>80</sup> *Ibid.*, 1.

<sup>81</sup> *Ibid.*, 9.

<sup>82</sup> *Ibid.*, 2-3.

branches of the government.”<sup>83</sup> Issacharoff proffers, on the issue of weighting the scale of rights and security, that historically where the political branches had acted “for legitimate reasons in closing the courthouse doors” judicial review yields, appropriately.<sup>84</sup>

Conversely, recent history has shown where the political branches close the courthouse doors illegitimately, unconstitutionally, judicial review will pry them open and apply a rights-based approach to balancing competing interests.<sup>85</sup> In this fashion, notwithstanding its critics, judicial review serves democracy not only institutionally, curbing “the excesses of majority power by voiding legislation [and executive action] contrary to the principles of justice expressed in the Constitution,”<sup>86</sup> but also by preserving human dignity, a democratic value of the individual right to be left alone by the government. Put another way, under Issacharoff’s approach, judicial review balances civil liberties and public safety/security for the mutual benefit of the government and the governed.

The caveat, because too much or too little liberty or too much or too little security can undermine human security, human liberty, national security, and U.S. legitimacy,<sup>87</sup> building a better understanding of how judicial review contributes to balancing competing interests during national emergencies, and in particular, the GWOT is

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<sup>83</sup> Issacharoff, “Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime,” 3-7.

<sup>84</sup> Ibid., 10-11 citing *Ex parte McCordle*, as the death knell of the rights-based approach for balancing competing interests during wartime because Congress “had stripped the court of jurisdiction to review the fate of a newspaper editor held by military authorities for trial before a military commission for having published incendiary pro-Confederate tracts,” a valid institutional process constrained the courts from inquiring into the ‘motives of the legislature.’” *Ex McCordle*, 74 U.S. (7 Wall) 606 (1868).

<sup>85</sup> See line of enemy combatant cases *supra* fn 7; Judge Richard M. Urbina, ordered the release of 17 detainees held at Guantanamo Bay Cuba, William Glaberson, “Judge Orders 17 Detainees at Guantanamo Freed,” New York Times, October 7, 2008, [http://www.nytimes.com/2008/10/08/washington/08detain.html?\\_r=1&scp=6&sq=guantanamo%20bay%20federal%20court&st=cse](http://www.nytimes.com/2008/10/08/washington/08detain.html?_r=1&scp=6&sq=guantanamo%20bay%20federal%20court&st=cse) (accessed January 26, 2009).

<sup>86</sup> Ibid., Crane, *Race, Citizenship, and Law in American Literature*, 25; David S. Law, “A Theory of Judicial Power and Judicial Review,” [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1112613](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1112613) (accessed October 24, 2008) explaining how judicial review operates as a mechanism for keeping the government within the limits of its power,” 10-14.

<sup>87</sup> Samantha Power, “Legitimacy and Competence” in *To Lead the World: American Strategy after the Bush Doctrine*, ed. Melvyn P. Leffler and Jeffrey W. Legro (New York: Oxford University Press, 2008), 137-138, 141-145.

warranted.<sup>88</sup> Pinpointing where the major fault line exists separating supporters and non-supporters of judicial review, before the next emergency, may serve to breakthrough barriers. To accord greater opportunity for investing judicial review theorists' collective intellectual capital and energies toward the creation and implementation of progressive HLDS strategies aimed at securing America, preserving her democracy and creating public value globally by promoting genuine democratization or liberalization, which research suggests matters greatly to mitigating extremism, and hence, reducing terrorism.<sup>89</sup>

So, consider arguing that it, judicial review as a function, chokes off public participation in creating and interpreting constitutional law and in enhancing life, liberty, and the pursuit of happiness for all the while fostering a more perfect union. Opponents of judicial review focus on a perceived transfer of power away from the public to an alleged disinterested, disincentivized, body of judges devoid of considered constitutional judgment necessary to balance competing interests correctly. The rejoinder: proponents of judicial review hail it as a function that rests on the constitutional foundation of shared sovereignty that serves to stimulate public participation in governing. For proponents, judicial review is instructive to how public participation in a democracy is coordinated to serve competing interests mutually beneficially, particularly during national emergencies when just balancing of competing interests is paramount.<sup>90</sup> The question then is does judicial review really foster *Juristocracy*, judicial despotism? Or, as Keith E. Whittington and David S. Law, among others, suggest: a democracy that respects human dignity.

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<sup>88</sup> David Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crises," Georgetown University Law Center Public Law & Legal Theory Working Paper No. 519442, Michigan Law Review, 101, no. 8 (August 2004), <http://ssrn.com/abstract=519442> (accessed August 18, 2008), 2565-2594.

<sup>89</sup> The judicial role in safeguarding the rule of law and human rights is key to genuine democracy and reducing political violence--terrorism. Kaye et al., "More Freedom, Less Terror? Liberalization and Political Violence in the Arab World," 170-171, 173-176.

<sup>90</sup> Toasting attorney Tom Wilner for representing detainees in Guantanamo, FBI director Mueller exclaimed "He's doing what an American should." Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*, 204-206.

#### **D. BALANCING COMPETING INTERESTS IN SHARED POLITICAL SPACES**

Keith E. Whittington explains how moved James Madison was with the “promise of [an impartial and independent] judiciary as a way of securing [the] union and preserving the peace” noting “. . . ‘the tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact.’”<sup>91</sup> In addressing concerns of representation, Whittington quotes John F. Kennedy to remind Americans to maintain interest in how judges operate in the political space open to them for governing stating where it is “impossible for people [] to secure adequate relief through the normal political processes . . . the judicial branch will meet the responsibility.”<sup>92</sup>

He explains the emerging literature on judicial review validates that “[judicial review] does not fit the “counter-majoritarian framework.”<sup>93</sup> The literature reveals that political leaders, policymakers, activists and the public at-large seeking through delegation to “insulate their policy preferences from future political majorities [and/or] to void statutes passed by previous governing coalitions” occupy the political space open to judges.<sup>94</sup> This shared political space allows public/private collaboration on balancing competing interests and turns the notion that judicial review fosters despotism as opposed to promoting democracy on its head.

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<sup>91</sup> Whittington, ““Interpose Your Friendly Hand:” Political Supports for the Exercise of Judicial Review by the United States Supreme Court,” 586.

<sup>92</sup> Ibid., 585, 589.

<sup>93</sup> Whittington reasons that U.S. political leaders delegate tasks to the courts, because “the courts may be able to perform more effectively or reliably than elected officials can acting directly.” He explores how the “structural characteristics of U.S. political systems encourage cooperation between judges and political leaders to obtain common objectives.” ““Interpose Your Friendly Hand:” Political Supports for the Exercise of Judicial Review by the United States Supreme Court,” 584; Law, “the factual premise that judicial review is counter-majoritarian has come under sustained empirical attack from multiple directions,” 4’ Mark A. Graber, “Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power,” 65 MD. L. Rev. 1, (2006), 5-10; Terri Peretti, “An Empirical Analysis of Alexander Bickel’s The Least Dangerous Branch,” in *The Judiciary and American Democracy: Alexander Bickel, The Countermajoritarian Difficulty, and Contemporary Constitutional Theory*, ed. Kenneth D. Ward & Cecilia R. Castillo, (2005), 123, 123-141.

<sup>94</sup> Ibid., 584-585.

Whittington exposes how judicial review through operating in shared political space with the public is democratic.<sup>95</sup> First, he finds support for judicial review in the appointment or election of judges who manifest a willingness to invalidate legislative or executive acts.<sup>96</sup> Second “in the encouragement of specific judicial action consistent with the political needs of coalition leaders” comprised of members from both the private and public sector<sup>97</sup> Whittington notes judicial review is welcome. Where coalition leaders are unable to persuade constituents or mobilize legislative allies to adapt policy, sympathetic judicial allies may accomplish indirectly what the coalition leaders could not accomplish directly.<sup>98</sup> Third, “in the congenial reception of judicial action after it has been taken,”<sup>99</sup> and, lastly, “in the public expression of generalized support for judicial supremacy in the articulation of Constitutional commitments” judicial review operating in shared space advances peaceable democracy.<sup>100</sup>

Who can forget *Bush v. Gore*? Where although there was profound disagreement with the U.S. Supreme Court’s decision, there was no appeal to the sword or dissolution of the compact, but, rather non-violent public acceptance.<sup>101</sup> Consider also, the line of enemy combatant cases, where the court progressively held that suspected terrorists were entitled to constitutional protections. Again, despite disappointment, the sword remains in its sheath and America remains unified. In short, supports for judicial review is

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<sup>95</sup> Whittington, ““Interpose Your Friendly Hand:” Political Supports for the Exercise of Judicial Review by the United States Supreme Court,” 594.

<sup>96</sup> Ibid., 583.

<sup>97</sup> Ibid., 584-585.

<sup>98</sup> Ibid., 591-592. On the issue of civil rights, Whittington discusses how judicial review can overcome cross-pressured political coalitions; see e.g., *Brown v Board of Education*, 347 U.S. 483 (1954).

<sup>99</sup> Whittington, ““Interpose Your Friendly Hand:” Political Supports for the Exercise of Judicial Review by the United States Supreme Court,” 587-589.

<sup>100</sup> Ibid., 585.-587.

<sup>101</sup> *Bush v. Gore*, 531 U.S. 98 (2000). The U.S. Court ordered counting of ballots halted in the presidential race ostensibly deciding the election.



located in a shared public/private political space where trust in judicial leadership<sup>102</sup> and strategic planning<sup>103</sup> for the preservation of America's genuine democracy and the people's security and civil liberties operates.<sup>104</sup>

## 1. Judicial Review and America's Legitimacy

Professor Samantha Power, writing on the need for collaborative efforts in developing strategy after the Bush Doctrine,<sup>105</sup> trumpets judicial review as a process for balancing competing interests as well as for enhancing U.S. global legitimacy, matching deeds to values, as it champions human rights.<sup>106</sup> In noting, "an alienated public will undermine the ability of U.S. foreign policy makers to achieve their aims"<sup>107</sup> Power, directs attention to the similar objectives of HLDS and national security strategies.<sup>108</sup> She and Zbigniew Brzezinski, author of "Second Chance,"<sup>109</sup> advocate strongly for greater American public collaboration (and sacrifice) in domestic and foreign policy

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<sup>102</sup> *Bush v. Gore*, 531 U.S. 98; Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crises," 2590-2591; Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York: New York, Penguin Press, 2007), 23-25.

<sup>103</sup> Bryson, *Strategic Planning for Public and Nonprofit Organizations: A Guide to Strengthening and Sustaining Organizational Achievement*, 6-8.

<sup>104</sup> Forest Maltzman, James F. Spriggs, II and Paul J. Wahlbeck, "Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making," in *Supreme Court Decision-Making: New Institutional Approaches*, ed. Cornell W. Clayton and Howard Gillman (1999); ("Institutions . . . influence strategic decision makers through two principal mechanisms-by providing information about expected behavior and by signaling sanctions for noncompliance), 43-46.

<sup>105</sup> Power, "Legitimacy and Competence" in *To Lead the World: American Strategy after the Bush Doctrine*, 140-142; G. John Ikenberry describes the Bush Doctrine as a permanent global security situation created by America's self-legitimizing unilateral efforts to preemptively and anticipatorily "use force any where in the world against 'terrorist with global reach' and to overthrow despotic regimes. "Liberal Order Building" in *To Lead the World: American Strategy after the Bush Doctrine*, 98; Niall Ferguson, "The Problem of Conjecture," in *To Lead the World*, 227-228.

<sup>106</sup> Power, "Legitimacy and Competence" in *To Lead the World: American Strategy after the Bush Doctrine*, 140-142; Melvyn P. Leffler and Jeffrey W. Legro, Dilemmas of Strategy, " in *To Lead the World: American Strategy after the Bush Doctrine*, "Restoring America's legitimacy requires more than theoretical emphasis on democracy, human rights, and political equality, [it] must be reflected in action," 263.

<sup>107</sup> Power, "Legitimacy and Competence," in *To Lead the World: American Strategy after the Bush Doctrine*, 150.

<sup>108</sup> *Ibid.*, 143-152.

<sup>109</sup> America needs to put a "premium on intelligent cooperative governance reinforced by power that is viewed as legitimate." Zbigniew Brzezinski, *Second Chance: Three Presidents and the Crises of American Superpower* (New York: Basic Books, 2007), 215.

matters to enhance U.S. legitimacy in leading the world after the Bush Doctrine.<sup>110</sup> Leading necessarily requires as Power points out “the organic capacity to step into ‘the enemy’s shoes’”<sup>111</sup> and for West<sup>112</sup> and Brzezinski, it requires a global discourse about rights, which discharges to the benefit of human dignity:

America needs to identify itself with the quest for universal human dignity, a dignity that embodies both freedom and democracy but also implies respect for cultural diversity and recognizes that persisting injustices in the human condition must be remedied.<sup>113</sup>

Brzezinski’s human dignity is the central challenge inherent in a phenomenon he calls the “global political awakening,” a “socially massive, politically radicalizing, and geographically universal” movement that historically “has been anti-imperial, politically anti-Western, and emotionally increasingly anti-American.”<sup>114</sup> Without focus on human dignity, Brzezinski explains the combined impact of the historical sentiments of global political awakening and modern technology is a recipe for increased terrorism.

Similar to Brzezinski, Power and West, Professor Fathali M. Moghaddam calls on Western nations and publics to pay attention, “Twenty-first-century terrorists are global and literally treat the world as a global village.”<sup>115</sup> Citing the findings of the Pew Global Attitudes Project on the rise of anti-Americanism, he concludes that the near global mood

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<sup>110</sup> Power, “Legitimacy and Competence” in *To Lead the World: American Strategy after the Bush Doctrine*, 137-142, 150-152; Brzezinski laments in *America and the World*, “our legitimacy and our credibility has been badly damaged,” 16; Whittington, ““Interpose Your Friendly Hand:” Political Supports for the Exercise of Judicial Review by the United States Supreme Court,” 586-587, 589-592; Cornel West, “The Role of Law in Progressive Politics,” in *The Cornel West Reader* (New York: Civitas Books, 1999), 270-274; Law, *A Theory of Judicial Power and Judicial Review*, 24-30.

<sup>111</sup> Power, “Legitimacy and Competence” in *To Lead the World: American Strategy after the Bush Doctrine*, 146.

<sup>112</sup> Cornel West, *Democracy Matters: Winning the Fight against Imperialism* (New York: Penguin Group, 2004), 9-12.

<sup>113</sup> Brzezinski, *Second Chance: Three Presidents and the Crises of American Superpower*, 202-204.

<sup>114</sup> *Ibid.*, 201-205.

<sup>115</sup> Fathali M. Moghaddam, *From the Terrorists’ Point of View: What they Experience and Why they Come to Destroy*, 7, 86.

of anti-Americanism is “that there is no peace because there is no justice, and the source of a lot of injustice is seen to be U.S. Foreign policy.”<sup>116</sup> He submits understanding the terrorists’ point of view is imperative to peace and reducing terrorist sympathizers:

From the terrorists’ point of view, there can be no peace without justice—as justice is defined by them of course. This is a vital point, because it is on this issue that terrorists gain some sympathy in parts of the world—both Western and non-Western. Sympathy for espoused terrorist causes is associated with, and may arise from, American foreign policy and related sentiments of anti-Americanism.<sup>117</sup>

Moghaddam goes on to identify as a contributing factor to terrorism the exportation of an American democracy that fails to speak to the “personal and collective identities and situations” of persons “on the ground floor of the staircase to terrorism.”<sup>118</sup> This impatient democracy imposed by the West seeks to impose it onto and into the Near and Middle East, is immature and does not possess the characteristics of Brzezinski’s human dignity<sup>119</sup> and although it provides for “free and fair elections,” ground floor occupants of the staircase to terrorism elect despots, dictators as leaders, Why? because contextualized democracy is missing. In other words, and in part, the cultural characteristics of judicial review carried out by an independent judiciary that permits all Americans to participate in the political spaces judges operate, to engage in concerted action in opposition to or in support for political actions, are largely absent in the Near and Middle East.<sup>120</sup> Often, the only available opposition vote in a non-contextualized democracy is cast for Islamic fundamentalists or radicals who support terrorism, directly or indirectly. Islamic fundamentalists or radicals, who the despots or dictators in high office marginalize through appeasement, allows them to exercise control over mosques

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<sup>116</sup> Moghaddam, *From the Terrorists’ Point of View: What they Experience and Why they Come to Destroy*, 7.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid., 45-58, 134-135. In making the point that “terrorists are made not born,” Moghaddam explores factors that impact the psyche of individuals ripe for terrorist recruitment (those on the third floor of the stair case to terrorism) explaining those individuals often suffer profound subjective sense of relative deprivation, distrust of Western Nations, entrapment in a “diabolical triangle involving the Islamic masses, Israel and local dictators.”

<sup>119</sup> Brzezinski, *Second Chance: Three Presidents and the Crises of American Superpower*, 204.

<sup>120</sup> Moghaddam, *From the Terrorists’ Point of View: What they Experience and Why they Come to Destroy*, 129-130, 132-135.

autonomously. These fundamentalists are permitted to tax congregants, to mold and shape the young minds of some men and women into terrorists in exchange for not interfering in democratic governmental affairs that among other egregious things refuse to recognize the rights of women.<sup>121</sup>

For Moghaddam, an impatiently imposed de-contextualized democracy sees “free and fair elections as the end result, rather than the starting point, of growth toward a democratic system.”<sup>122</sup> In an impatient democracy, an independent judiciary is circumscribed or absent; mechanisms for making government accountable for its actions, is circumscribed or absent; opportunities for developing grassroots participation, where citizens openly exchange opinions and information, is circumscribed or absent.<sup>123</sup> In such democracies, a history of judicial review of political acts that deny rights, which are inherent to human dignity and from which future political action is checked, is circumscribed or altogether missing.<sup>124</sup> In short, without judicial review, the rule of law is silenced, the legitimacy of emerging democracies is undermined and the individual rights of a people go unrecognized, and legitimate grievances go unredressed, thus opening space for terrorists to recruit ground floor occupants on the staircase to terrorism with ease.<sup>125</sup>

David Cole orients the reader to the long-term benefits America’s judicial review has provided to preserving individual rights by “. . . narrowing the range of rights-violative options available to the government in the *next* emergency.”<sup>126</sup> In explaining a

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<sup>121</sup> Moghaddam, *From the Terrorists’ Point of View: What they Experience and Why they Come to Destroy*, 127-145; Fathali M. Moghaddam, *Multiculturalism and Intergroup Relations: Psychological Implications for Democracy in Global Context* (Washington, DC: American Psychological Association, 2002), 96-98.

<sup>122</sup> Moghaddam, *From the Terrorists’ Point of View: What they Experience and Why they Come to Destroy*, 134.

<sup>123</sup> Ibid., 129-130, 132-135.

<sup>124</sup> Ibid, Threats to genuine democracy stem from a “lack of progress on rule of law and judicial reform . . . . Torture, political imprisonment, anti-assembly laws, arbitrary arrests, censorship, and abusive security services continue to erode regime legitimacy” in the Near and Middle East. Kaye, et al., “More Freedom, Less Terror? Liberalization and Political Violence in the Arab World,” 170-171; 174-176.

<sup>125</sup> Ibid.

<sup>126</sup> Cole, “Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crises,” 2586.

revisionist view of judicial review of public safety and security measures enacted during an emergency or after it has ended, Cole discusses judicial imposition of “a degree of restraint on the government’s actions during the next emergency”<sup>127</sup> that is essential for sustaining America’s sovereignty, promoting public value and legitimacy globally.<sup>128</sup> Rejecting Tushnet’s and Gross’s argument that granting the political branches extra-constitutional authority<sup>129</sup> to impose emergency public safety and security measures, during times of crises, Cole and other scholars warn that during an emergency, panic<sup>130</sup> becomes the primary driver that the public and their political representatives respond to as “security measures launched in its name are approved.”<sup>131</sup>

What actions then can the American public take during the present global political awakening to enhance human dignity and U.S. legitimacy, before the next emergency to guard against security measures driven by terrorist-inspired panic? The researcher suggests collaborating, within shared political space on those factors the Supremes view as essential in determining the appropriateness of suspending or limiting civil liberties during national emergencies and how those factors should be balanced and why, would be of use. Such collaboration may lead the public to endorse extra-constitutional authority to act unilaterally premised on the charge that the Constitution is not a suicide

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<sup>127</sup> Cole, “Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crises,” 2571, 2575-2577.

<sup>128</sup> Ibid., 2590-2592; Power, “Legitimacy and Competence” in *To Lead the World: American Strategy after the Bush Doctrine*, 141. Discussing what is needed to address “the global symbol of U.S. extralegal detention practices” Power identifies the restoration of habeas corpus as “the most vital Constitutional protection against the arbitrary exercise of executive power.”

<sup>129</sup> In “Judging the Next Emergency, Judicial Review and Individual Rights in Times of Crises,” Cole quotes Oren Gross, noting that Gross would “inform public officials that they may act extra-legally when they believe that such action is necessary for protecting the nation and the public in the face of calamity provided that they openly and publicly acknowledge the nature of their actions,” 2586.

<sup>130</sup> Cole, “Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crises,” 2589-2590; Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*, 1-10; Brzezinski, “Terrorized by ‘War on Terror’: How a Three-Word Mantra Has Undermined America,” *Washington Post Op-Ed*, March 25, 2007.

<sup>131</sup> Ibid., Ickenberry, “Liberal Order Building,” in *To Lead the World: American Strategy after the Bush Doctrine*, 98.

pact. Or, it may not, upon considering “Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy.”<sup>132</sup>

Before 9/11, in saner moments, Professor Cornel West championed the promise of judicial review and progressive legal practice to promoting social activism in response to “civic terrorism” resulting from “political neglect and social invisibility.”<sup>133</sup> After 9/11, West, in decrying America’s imperialistic behavior, and unilateral militarism built on “a narrow patriotism and a revenge-driven lust for a war on terrorism,” wrote that enhancing U.S. legitimacy and enriching global democracy requires:

that we keep track of the intimate link between domestic issues and foreign policies . . . . What we do abroad affects what we can do here and what we do here shapes what we can do abroad . . . . It is impossible to talk about democracy matters on a global scale without engaging these questions.<sup>134</sup>

## **2. Judicial Review and Human Rights and Social Justice**

Regarding questions about human rights and social justice in America and the Middle East, Westernian philosophy supplicates “progressive lawyers to adopt a two-pronged ideological strategy consist[ing] of an unrelenting defense of substantive democracy and all-inclusive liberty (as best articulated in the Bill of Rights).” Accordingly, West shares awareness with Moghaddam,<sup>135</sup> Kaye, et al.,<sup>136</sup> and Crane that judicial review performed by an independent judiciary invites and operates in a public/private collaborative world of constitutional rights:

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<sup>132</sup> Here Cole quotes Senator John Stockton, Cong. Globe, 42 Cong., 1<sup>st</sup> Sess. 574 (1871), in “Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crises,” 2590.

<sup>133</sup> Cornel West, “The Role of Law in Progressive Politics,” 270-274.

<sup>134</sup> Cornel West, *Democracy Matters: Winning the Fight against Imperialism*, 9-12.

<sup>135</sup> Moghaddam, *From the Terrorists’ Point of View: What they Experience and Why they Come to Destroy*, 134.

<sup>136</sup> Kaye et al., “More Freedom, Less Terror? Liberalization and Political Violence in the Arab World,” 170-171, 174-176.

Rights denote a protected sphere of personal autonomy and liberty, whose precise shape and dimension are unspecified. To amplify the term by referring to preserving life, liberty and the pursuit of happiness does not really resolve the ambiguity (the familiar triad does not, for instance, tell us how to adjudicate conflicts between different people exercising their “rights”). This ambiguity is both the product of and predicate for the continuing cultural and political dialogue through which American Society frames and devises its notions of basic individual freedoms.<sup>137</sup>

Significantly, the familiar triad does not reveal how to balance competing interests during the GWOT either. That said, the familiar triad can serve to inspire publics to participate in a dialogue about balancing competing interests, post 9/11 and pre, during the next emergency. It can inspire publics to journey into the space of constitutional ambiguity<sup>138</sup> where National Security and HLDS are linked and where judicial review operates; to journey there with comfort and trust in judicial leadership and strategic planning capacity to generate public value.

David S. Law writes convincingly about judicial leadership and strategic planning capacity manifested through the exercise of judicial review, stating and explaining how judicial review can be understood as an institutional mechanism that facilitates popular control over the government by conveying information and shaping beliefs about how the government behaves and how the people are likely to respond.<sup>139</sup> He explores how judicial review serves an important governmental monitoring<sup>140</sup> and oversight<sup>141</sup> function on behalf of the public (the collective principal in an agency relationship with the government as agent)<sup>142</sup> who sounds a “fire alarm,” by bringing a complaint before the

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<sup>137</sup> Cornel West, “The Cornel West Reader,” in *The Role of Law in Progressive Politics*, 270-274, Crane, *Race, Citizenship, and Law in American Literature*, 24; Moghaddam, explains that an independent judiciary is an essential part of getting people to feel that they are part of the political decision making process. *From the Terrorists Point of View: What they Experience and Why they Come to Destroy*, 134.

<sup>138</sup> Richard A. Posner, *How Judges Think* (Cambridge: Massachusetts Harvard University Press, 2008), 251.

<sup>139</sup> Law, “A Theory of Judicial Power and Judicial Review,” 9.

<sup>140</sup> Ibid., “courts perform a monitoring function, which is to say that they expose and publicize misconduct,” 34.

<sup>141</sup> Ibid., “A Theory of Judicial Power and Judicial Review,” 24-30.

<sup>142</sup> Ibid., “Judicial Review Supports Popular Sovereignty by Mitigating the Principal-Agent Problem that Lies at the Heart of Democratic Government,” 8.

court, after suspecting political branch misconduct.<sup>143</sup> The courts respond by gathering reliable information and developing raw data from executive and legislative activities, which forms the basis of the alleged misconduct, and uses its professional expertise that members of the general public are unlikely to possess to analyze the executive and legislative activities for constitutional consistency.<sup>144</sup> The court via judicial review, provides signals<sup>145</sup> to the public, including: “the media and the academy, [] opposition parties, interest groups and the bar” to cooperate<sup>146</sup> with one another to coordinate<sup>147</sup> peaceable action against the political branches where public safety and security measures revile civil liberties too strongly.<sup>148</sup> For Law, judicial review contrary to Waldron’s protestations<sup>149</sup> provides an efficient and economical way for the public at-large with the opportunity to participate collaboratively<sup>150</sup> and peaceably<sup>151</sup> in genuine democracies. In short, applying Law’s analysis judicial review is material and relevant to democracy’s quest to reduce terrorism, because it arms the public with reliable information. It opens a conduit for the public to operate in the political spaces judges operate, to engage in

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<sup>143</sup> Law, “A Theory of Judicial Power and Judicial Review,” 27.

<sup>144</sup> *Ibid.*, 28, 32.

<sup>145</sup> *Ibid.*, 51-57. Law describes how the courts are like traffic lights and explains judicial review is the “common signal,” the “focal point” upon which the public can “treat as the basis for acting against the government;” Maltzman et al., “Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making,” in *Supreme Court Decision-Making: New Institutional Approaches*, 43-46.

<sup>146</sup> Law, “A Theory of Judicial Power and Judicial Review,” 31, 33-45 (“the task of monitoring the government is not one that the courts perform in isolation and without assistance. . . . it is instead a task that calls for courts and other institutions to cooperate with one another in order to perform effectively.”); see also, Jeffery K. Staton, “Constitutional Review and the Selective Promotion of Case Results,” 50 *Am. J. Pol. Sci.* 98, 99, 102-111, 110 tbl.4.

<sup>147</sup> Law, “A Theory of Judicial Power and Judicial Review,” 35-45.

<sup>148</sup> *Ibid.*, 45-51. Law describes how judicial review serves the public in guarding against tyranny.

<sup>149</sup> Waldron, states that judicial review does not “. . . provide a way for a society to focus clearly on the real issues at stake when citizens disagree about rights; . . . it distracts them with side-issues about precedent, texts, and interpretation.” “The Core of the Case against Judicial Review,” 1353.

<sup>150</sup> Law, “A Theory of Judicial Power and Judicial Review,” (“Judicial review can remedy [problems of public coordination] and supply the necessary focal point for popular policing of the state”), 55.

<sup>151</sup> *Ibid.*, 39-40.



concerted action in opposition to or in support for legislative and executive acts,<sup>152</sup> particularly those relating to balancing competing interests, during the GWOT and beyond.<sup>153</sup>

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<sup>152</sup> Law, “A Theory of Judicial Power and Judicial Review,” 8-11, 67-77; Cornel West, “The Role of Law in Progressive Politics,” in *The Cornel West Reader*, 272-274, discussing the role of progressive lawyers in judicial review and politics.

<sup>153</sup> Law, “A Theory of Judicial Power and Judicial Review,” (“judicial review, far from posing a threat to popular rule, instead performs functions that are crucial to the maintenance of popular sovereignty”), 7.

## IV. JUDICIAL REVIEW MATTERS IN DEMOCRACY'S QUEST TO TERROR HYPOTHESES

### A. HYPOTHESES

Based on the literature review above, the researcher has identified three (3) hypotheses regarding whether the Supremes views on balancing the competing interests and judicial review performed by an independent judiciary is material and relevant to democracy's quest to reduce terrorism:

1. **Counter-majoritarianism:** Judicial review inveighs against popular constitutionalism (e.g., it precludes public participation in creating constitutional law through action in politics) by voiding political branch action. Hence, judicial review is illegitimate, immaterial and irrelevant to democracy's quest to reduce terrorism.
2. **Post Counter-majoritarianism:** Judicial review serves the strategic function of galvanizing and coordinating public participation in the political spaces judges operate to interpret and create constitutional law. Judicial review is material and relevant to democracy's quest to reduce terrorism because it provides a conduit for seeking redress of legitimate grievances through nonviolent means.
3. **Legitimacy:** Judicial review serves to enhance the legitimacy of a sovereign and to promote a contextualized democracy by upholding the rule of law, individual rights and freedoms with transparency. Judicial review is material and relevant to democracy's quest to reduce terrorism because it is a stabilizing force against tyranny.

The hypotheses will guide the reader's exploration of the views of Chief Justice Joseph R. Weisberger (Ret.) of the Rhode Island Supreme Court, on balancing the competing interests during the GWOT. The Chief Justice has served in a judicial capacity for over forty-five years and continues even in retirement to hear and decide cases. In addition to having graduated from Brown University Magna Cum Laude and Harvard University School of Law, the Chief Justice holds 12 honorary degrees. He has also served on or chaired numerous boards and conferences, including Past Chairman Appellate Judges Conference ABA; Past Chairman National Conference State Trial Judges; Past Member House of Delegates ABA; Past Member Council of Judicial Administration Division, ABA; Past Member of American Law Institute, Past Member and Senior Faculty N.Y.U. Appellate Seminar; Member Education Committee of

Appellate Judges Conference. He is a Life Fellow of the American Bar Foundation and has been a faculty member of the National Judicial College since 1966. Appointed by Pope John Paul II to office of Knight Commander with Star Order of St. Gregory, the Chief Justice also served in the United States Navy from 1941 to 1946, released with the rank of Lieutenant Commander.

The hypotheses will also guide the reader through an examination of the survey data revealing the Supremes' views on balancing competing interests during the GWOT. Twenty-two out of fifty-five Supremes responded to the researcher's request for their participation in the survey, thirteen provided answers to the survey questions, ten provided answers to all 30 questions and two (2) provided answers to one (1) question. The remaining Supremes graciously provided reasons for their decision not to participate, which ranged from legislative/ethical prohibition, policy concerns, or the appearance of impropriety.

The researcher provides selected portions of the Chief Justice's narrative organized to assist the reader to locate quotations on particular topics. That said, because his narrative addresses more than one topic, the decision as to where to place quotations is subjective, and not everything on the same topic is in the same section. Moreover, although the hypotheses above will serve to inform the researcher's concluding thoughts, aside from the interview questioning, editorial comment of the Chief Justice's narrative and survey data have been limited to the extent possible, editorializing only to direct attention to points of significance and to put the data in context. This process requires greater critical analysis on the part of the reader, but hopefully, the quasi-direct access to the Supremes' views will prove more useful to Socratic questioning, which as Professor West offers "requires a relentless self-examination and critique of institutions of authority, motivated by an endless quest for intellectual integrity and moral consistency. . . [i]t is manifest in a fearless speech—*parrhesia*—that unsettles, unnerves, and unhouses people from their uncritical sleepwalking."<sup>154</sup>

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<sup>154</sup> Cornel West, *Democracy Matters: Winning the Fight against Imperialism*, 16.

## B. STATE SUPREMES BALANCE

For judicial review theorists and non-judicial review theorists alike, constitutions are held in high esteem. Non-judicial review theorists quarrel not with the existence of constitutions, but with the power of judges to interpret them.

### 1. Question 1

*Q1. Whether the integrity of Constitutions (federal and/or state) is paramount when balancing the competing interests during the GWOT.*

For the Supremes who interpret constitutions, Figure 1 illustrates their responses to survey question 1.

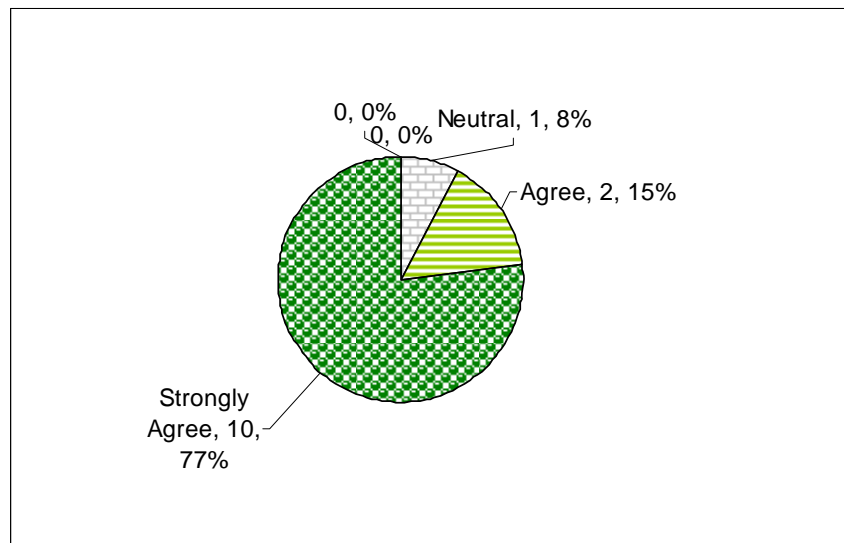


Figure 1. Supremes' responses to survey question 1.

**Researcher:** I begin with a personal observation. The United States had counterterrorism policies in place before the horrific events of September 11, but there did not appear to be a concerted national effort to deal effectively with terrorism the way there is today, there was no GWOT. It is undisputed that America wants to defeat terrorism. The challenge is to preserve America's identity as a free society, simultaneously, so neither the GWOT nor oppressive public safety and security measures implemented in its name become America's new normal, and thus, define its national or

global identity. There must be a collective and concerted effort amongst foreign and domestic government officials, and the public to address terrorism, diplomatically; otherwise, the U.S. may be headed down a road that could lead to a contraction of civil liberties in a way that getting back to America the way it existed pre September 11 would be very challenging. America cannot win the so-called war on terror solely through law enforcement, picking up arms and waging a military battle.

**Chief Justice:** Absolutely a delicate balance is required. Self-preservation is a basic instinct of humankind. Men and women will do what they need to preserve themselves and their existence. But, it is very important in a society, such as ours, that we preserve ourselves in the model and the institutions that we have nurtured for over two centuries. This is part of our being. It is a part of what we are and if we lose those characteristics we have lost the war, we have lost the war . . . if in the course of fighting Nazism, we became Nazis we would have lost the war to Adolph Hitler. Thank the Lord we did not. We participated in a global war in World War II and we emerged a free country. We participated in a Cold War and we emerged from that as a free country. And, I would hopefully predict that we would emerge from the war against our subversive terrorist, whether they be jihadist al Qaeda or whatever form they will take--we shall emerge from that as a free country and I say that as a veteran of World War II.

**Researcher:** Is there a relationship between America as a free country and upholding the integrity of the Constitution?

**Chief Justice:** The integrity of our Constitution is, to a great extent, the definition of our national existence without our Constitution (federal and state) we would not be the nation that we are. And, therefore, homeland defense and security measures and the war on terror demands the premise that we are protecting the nation that is embodied in our Constitution.

## 2. Question 6

*Q6: It is essential that Congress and the Executive Branch act in concert in authorizing public safety/security measures.*

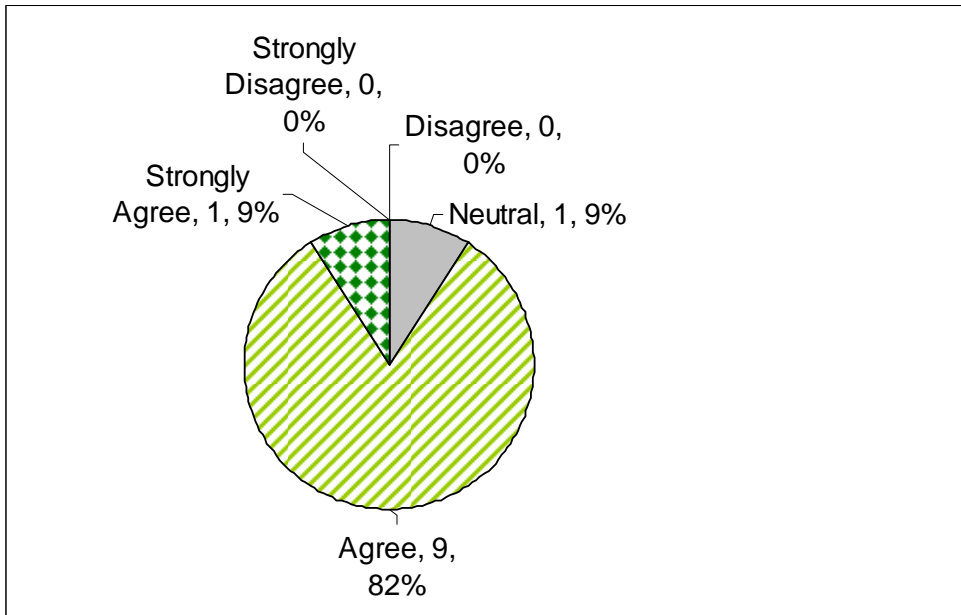


Figure 2. Supremes' responses to survey question 6.

**Researcher:** Is there a connection between preserving the integrity of our Constitution and improving the image of America globally, which can reduce the spread of terror?

**Chief Justice:** America has been described as a beacon on the hill just as the statute of liberty has been the emblem of a free state and a refuge from tyranny so, indeed, is our nations of laws and liberties a model for the world. It has been a model since its founding. Now, I cannot say that all people in all nations will love America because of its freedom and because of its idealism that has always been perhaps a dream that has never achieved full accomplishment. I think we were despised by imperial Japan. I think we were despised by the regime of Adolph Hitler. I think tyrants despised us throughout our history. However most people and in most nations throughout the world respected America for her ideals and the purity of her motives. I believe that this characterization is part of our reputation part of our reason for being and is basic to our reputation throughout the world.

**Researcher:** What message, then, should America be imparting to the world during this time of national emergency, the global war on terror, our notion of freedom as embodied in the Constitution?

**Chief Justice:** However devoted we are to our constitutional system of a republican government we must realize, of course, that all peoples in all times do not necessarily agree with the principles of democracy or the principles that are embodied in our constitutional form of government. There have been and are nations who are ruled under monarchical principles who are devoted to a system of government that for example may have a very strong mixture of religious dominance as opposed to separation of church and state. There are countries in which a religious influence is expected, taken for granted and highly prized. I will give you one historical example in our own country.

Roger Williams was disdained by Massachusetts and Connecticut because he espoused religious tolerance. Massachusetts and Connecticut did not. The puritanical government in those two colonies absolutely considered tolerance to be a vice rather than a virtue. Now, there are some countries in the world today some of them devoted to Islamic law where a democracy such as ours would not be considered desirable, but government by clerics would be considered the ideal form of government. We have to respect those differences.

**Researcher:** What role can the state judiciary play in assisting those with divergent views from ours to choose methods other than violence to govern? Put another way, what can the judiciary do to affect America's global image, positively during this time of national emergency?

**Chief Justice:** Well the state judiciary and the federal judiciary are responsible for enforcing the laws that exist in our state and nation. They are responsible for supporting the Constitution of their respective states and the Federal Constitution. They, of course, are not responsible for sustaining or enforcing the statutes and laws of other countries. However, insofar as there are citizens or nationals of those countries in our nation their views are entitled to respect. They are entitled to believe as they believe and

under our First Amendment, they may express those beliefs and both state and federal courts must respect that expression and must safeguard it as part of the American system of tolerance and freedom of expression.

### 3. Questions 28 and 29

*Q28: Modern terrorism may require the States' Judiciary as "independent tribunals of justice" to serve an increased role against the "assumption of power in the legislative or executive branch. . .to resist every encroachment upon rights expressly stipulated in the constitution by the declaration of rights"*

*Q29: The State's judiciary may have a critical role in national security measures or more precisely homeland defense and security because the National Strategy for Information Sharing of 2007 strongly encourages federal, state, local and tribal governments to share intelligence information relating to terrorist activity.*

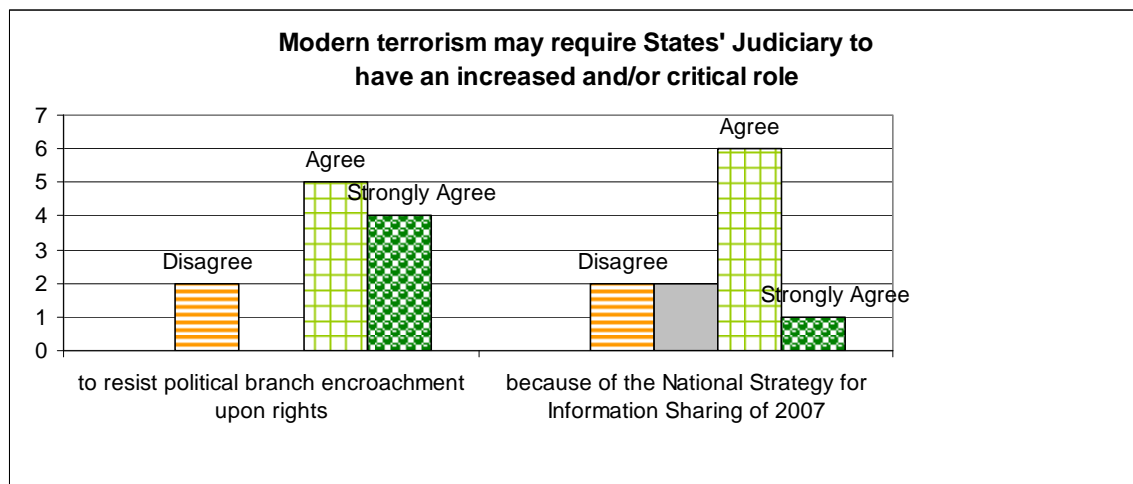


Figure 3. Supremes' responses to survey questions 28 and 29.

**Researcher:** So, the courts role in enhancing the legitimacy of America globally can include—

**Chief Justice:** Our government being viewed as legitimate is a great source of strength; I think a great source of strength among civilized nations. There may be nations or people living within nations who are disinterested in legitimacy and interested only in what they consider are right or wrong. For example, the terrorists against whom we



hoped to be protected are generally not concerned with legitimacy except legitimacy as they construe it and legitimacy as they construe it would be vastly different from the type of legitimacy we have created in the American experiment. Not everyone is interested in democracy. This is the one thing that Americans must accept that while democracy is our main objective and pride not all the people in the world want democracy or ever have wanted it. Now, I believe that judicial review, which was really declared by John Marshal in *Marbury v. Madison* has been the great source of strength to our government and to our democracy by keeping it channeled within areas that protect individual liberty against the power of the state it has given great legitimacy to the American government system.

#### 4. Question 7

*Q7: America's image globally is a key factor to consider when weighing the competing interests of civil liberties and public safety/security measures during times of national emergencies.*

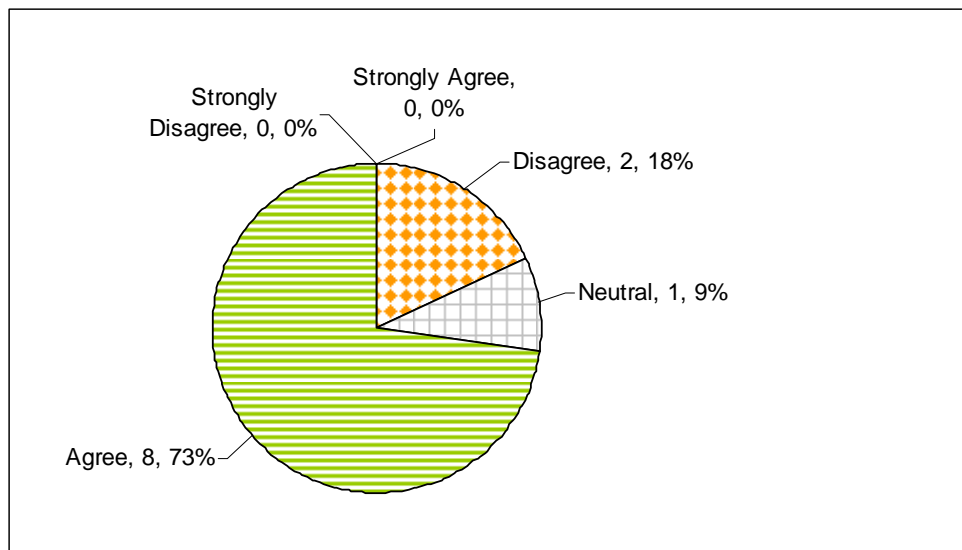


Figure 4. Supremes' responses to survey question 7.

**Researcher:** Is judicial review counter-majoritarian?

**Chief Justice:** Judicial review is not designed to be counter-majoritarian, unless it has to be. The court is not desirous of acting in a counter-majoritarian way unless the majority has impinged upon fundamental rights or has created a suspect classification.

**Researcher:** --the majority being the political branches?

**Chief Justice:** The majority being the political branches or even the public vote, I don't think there is any question that even segregation in Mississippi would have been supported by popular vote, in the 1950s, I have no doubt about it. The court does not act in a counter-majoritarian way, joyfully, but it moves when it must to protect fundamental rights and to prevent the creation of suspect classification or invidious discrimination by a majority. Whether the Founders intended it to be so, and I doubt that they really gave it much thought at the time they were devising the original Constitution in 1787 or the Bill of Rights in 1791.

**Researcher:** You would not, then, agree that judicial review inveighs against popular constitutionalism.

**Chief Justice:** I do not agree that judicial review inveighs against popular constitutionalism. I believe that our actions in politics create a context in which constitutional law could be considered and applied, but I believe that the concept of judicial review provides an expert professional oversight. It creates the limits upon our constitutional actions. I do not believe that the meaning and the application of the Constitution should be decided by random activity or even by popular vote. It is not susceptible to that kind of interpretation. Our 200 hundred years of constitutional history I believe would support my point of view.

**Researcher:** Would you say judicial review serves a strategic function?

**Chief Justice:** Yes. Limits upon our constitutional actions cannot be discerned from random activities of millions of citizens who have not seriously considered the question of constitutional application. I think that it requires an organized professional oversight.

**Researcher:** So, the strategic function of judicial review is organizational.

**Chief Justice:** The activities of individuals in our society create a context in which judicial review takes place. In other words, the current of ideas has an influence without question upon judicial decisions.

**Researcher:** Does judicial review invite public participation in the political spaces judges operate.

**Chief Justice:** I think that it tends to be somewhat remote from public participation.

**Researcher:** Remote--but if members of the public are not equipped on their own to grapple with the complexities of constitutional application . . .

**Chief Justice:** Oh, yes and I suppose we have to recognize that under the law the court cannot go out and simply decide cases or questions in the abstract. They must await litigation to be brought by a party an individual or a group of individuals. They bring a question before the court for determination. The court just cannot reach out and decide issues unless people bring cases or controversies before them for adjudication and it goes up through the system. It starts out in a State or Federal court and gradually winds its way up to the United States Supreme Court. But, it is an individual who starts the process. If we take the outstanding case of *Brown v Board of Education* these were individual parents of no particular wealth prominence or political power they just brought a lawsuit.

**Researcher:** That is the meaning here, exactly, of public participation in political spaces that judges operate.

**Chief Justice:** Right. It is of course the individual who brings the litigation, which is the vehicle by which the court expounds on the constitutional values. They cannot do it in the abstract. The judiciary provides an alternative to violent resolution of disputes--that isn't just the Supreme Court of the United States, by the very function of the judiciary within our states, cities and towns across the nation it provides a peaceful resolution of dispute. Courts cannot create its own litigation it must wait for that litigation to be brought before it.

**Researcher:** Yes, and then written judicial opinions can then serve to narrow the range of rights violations available to the political branches, before the next emergency.

**Chief Justice:** Yes, judicial review serves as a traffic control type of operation.

**Researcher:** Stop, go, yield--do you think that it was the intention of the Founders of the Constitution and Bill of Rights to create those documents to serve a strategic function for public participation to preserve the integrity of the Union, to provide an outlet for citizens to pursue a peaceable solution where rights were concerned?

**Chief Justice:** The Founders in Philadelphia did not create the Bill of Rights in 1789. Congress proposed a Bill of Rights and in 1791 they were ratified, so when the Founders were in Philadelphia they were creating a framework for government and, as they say, a more perfect union. The Bill of Rights came later and they certainly were designed to provide a peaceable means for enforcement of the rights of citizens vis a vis their government. The drafters of the Bill of Rights certainly James Madison and the others, who were active in Congress at the time, had recent experience with a remote government in London, which they did not find responsive to recognition of the rights of individuals even as those rights were considered by the colonists to be basic rights of Englishmen and that led of course to a violent outcome a revolution. And, our Bill of Rights as ratified was designed to limit the power of the national government so that they would not repeat the offenses that parliament had created prior to the revolution. It was a limitation on federal power initially later on by interpretation those rights were extended to protect individuals against State and Local government as well as the federal government, but initially they were designed to protect abuses from the national government only--*Baron v. Baltimore* 1833. The Bill of Rights is the framework of our liberties.

**Researcher:** Would you agree that judicial review operates as a function that rests on the Constitutional foundation of shared sovereignty?

**Chief Justice:** I would say that it is the duty of the judiciary to declare the limits that other branches of government may not exceed and to protect the rights of the individual against the right of government to maintain security, which of course is the function of government that is its paramount function to provide security. A government that does not provide security will not last long. There is of course a tension between the principles of democracy and the rule of the majority on the one hand and constitutional

imperatives on the other hand. The Constitution is a limit on the rights of the majority. It is designed to protect minorities from what majorities if uncontrolled determine those rights to be. So there is a tension, however, the Constitution is the supreme law of the land and even the will of a majority cannot overcome constitutional imperatives. If it had not been for judicial review equal rights would not have been given in the old states of the confederacy to African Americans in regard to education voting and other basic rights of citizenship.

**Researcher:** Do you think that the willingness on the part of the American people to accept the decisions of the judiciary specifically as they accord or address the issue of civil liberties-individual rights stems from the ability of the court over many many years to instill trust?

**Chief Justice:** --trust in the judiciary itself?

**Researcher:** Yes.

**Chief Justice:** I think the confidence of the American people in the judiciary and its willingness to accept the rulings of the Supreme Court of the United States can only be described as very high. I think an example is when Franklin Delano Roosevelt, a very popular president, came forward with a plan to pack the United States Supreme Court. Roosevelt sought to overcome what he regarded as the Court's resistance to many aspects of the New Deal such as the National Recovery Act and some other elements that had been designed to help the United States emerge from the great depression. And, in spite of the fact that Roosevelt was elected to four terms of the presidency and was a very popular president his plan to pack the Court was opposed by an overwhelming majority of popular opinion. Now that is a long time ago but I think the confidence in the Court remains even though people may disagree with a decision or more than one decision.

**Researcher:** I think a more recent example of the confidence or trust that the American people have in a decision made by the Court was *Bush v. Gore*.

**Chief Justice:** Yes, *Bush v. Gore*. In many countries that would have led to an armed insurrection. The miracle of the United States is the manner in which the reigns of government are peacefully transferred from one administration to another. The greatest military power on earth bows to the popular vote contrast that with Robert Mugabe in Zimbabwe who simply will not accept a vote that is not in his favor.

**Researcher:** He would not yield power . . .

**Chief Justice:** He would not yield power and that of course is one example that has happened in other places as well. The constant miracle in the United States is the acceptance of a decision either by the people in voting or by the courts. The opinion may redound to the great disadvantage of the person against who it is issued, for example president Nixon when he was forced to turn over the tapes he knew that would lead to his political ruin. Yet he probably never considered physically opposing it even though he was commander-in-chief of the army, the navy, the air force. He was the one who appointed all the federal marshals who would enforce the decision and yet he obeyed it even though he knew it would result in his political, how would one say, ruin.

**Researcher:** Do you agree that non-judicial institutions like the United States Senate should perform judicial review?

**Chief Justice:** I would not agree that that is a good idea. I have great respect for the United States Senate. As you well know, of course the United States is made up of many lawyers. You need not be a lawyer to be a United States senator and there are many non-professionals non-lawyers in the Senate. Even though members of the Senate, who happen to be lawyers, are primarily interested in the political process as opposed to the determination of purely legal rights as they might be, if they were practicing their profession elsewhere... Whereas in the Senate they are entirely devoted to let us say balancing competing interests and legislating for the benefit of their constituents and that is for the benefit of the country, but they are making law rather than declaring what the law is. I believe that declaring what the law is, is a matter that requires complete professional dedication and requires independence of judgment not thinking of constituents looking over ones' shoulder and worrying about re-election. I think the

Founders were enormously wise in creating a judiciary that was not subject to the electoral process. One of the best examples of the lack of judicial review that I can give you is the Reichstag in Germany 1933. The Reichstag was not subject to any judicial review. Whatever the Reichstag voted was the law of Germany and you know what the Reichstag did. It established a dictatorship that was; I suppose you might say, was one of the horrible examples of tyranny, terrorism, and despotism. Yet within the German framework, it was completely legal. Adolph Hitler was a legalist. Within the framework of the German system, which gave the Reichstag complete power all he had to do was to dominate the Reichstag and he did. The Reichstag gave him the Power of Chancellor and ultimately the power the complete power of the German state. And, what was missing, judicial review. There was no judicial review in Germany. There is now, but there wasn't then. That is the best example I can think of for the absence of judicial review.

**Researcher:** Would you say, this provides a good example of why the United States must continue to have judicial review, particularly during the GWOT.

**Chief Justice:** Yes indeed, yes indeed, because you cannot depend even on an intelligent legislature. I don't think that one can pretend that the Germans were not educated and intelligent people, they were. Members of the Reichstag probably would compare favorably intelligence wise with members of any legislature at any time or place excepting as they balance what they determined to be the competing interest they made a terrible decision, which plunged not only Germany but also the world into one might say abysmal conditions for decades.

**Researcher:** Would you say judicial review performed by an independent judiciary fosters despotism.

**Chief Justice:** I would say it does not. I would say that it strengthens American democracy by limiting the role of government and preventing government from overstepping its bounds even for what it may consider to be a benign purpose. Going back to our German example, the Reichstag was weighing competing interests: terrible economic conditions in Germany the limitations of the treaty of Versailles, inflation, loss of territory, loss of prestige and in balancing these competing interests they gave power

to a despot who would restore their national pride. I would say that in 5000 years of recorded history the average person has frequently traded liberty for despotism in order to avoid what he or she would consider anarchy. The one state people would not accept is anarchy. They would take tyranny every time and after some experience with tyranny they would try to break out of it, but much of human history on earth is a history of despotism to create security. There is a longing for security and the man on the white horse is always promising security enforced often by the sword. We see that happening, at the moment. One of the recent decisions, *Boumediene v. Bush* concerning the Guantanamo detainees was an example of limiting the power of the executive and limiting the power of the legislature. During the war, during the civil war the Supreme Court of the United States did not wrestle with that question until after the war was over. The right of habeas corpus was gravely limited during the civil war. Secretary of War, Stanton jailed editors and many many individuals, citizens, during the period and the Court did not declare these acts unconstitutional until after the war was over. That was *Ex parte Milligan*.

**Researcher:** Perhaps the Court's opinion in *Boumediene v. Bush* would have been different, if the GWOT was actually taking place on American soil.

**Chief Justice:** There is no question that during the civil war the turmoil and the strife were very close to the seat of government. Washington was just across the Potomac from Virginia, which, you might say, was the heartland of the Confederacy. However, Alabama might claim to be the heartland—Virginia was very very much a part of the Confederacy and the home of the army much of the time just across the Potomac. Maryland, Baltimore on the other side was a hotbed of secessionist feelings even though Maryland did not secede. So hostile forces surrounded the government, and of course, that explains why President Lincoln acted so forcefully. He definitely felt threatened and the members of his cabinet felt threatened as well--actually, physically threatened. Nevertheless, I say that the Supreme Court is willing to deal with these problems while the Supreme Court during the civil war may not have felt it was able to deal with those problems. You might say, amid the clash of arms, the law is silent.



**Researcher:** Well, I suppose, today, judicial review is essential to preventing an appeal to the sword and dissolution of the compact.

**Chief Justice:** I do believe so.

**Researcher:** Do you agree that judicial review encourages cooperation between judges and political leaders to obtain common objectives.

**Chief Justice:** I do agree. They don't cooperate in the active sense of working together or conferring together, but I believe that the judiciary exercises deference to the power of the legislature to determine what is necessary for the public welfare. I think their review of legislative action is deferential particularly where economics are at issue, but less deferential in matters of civil liberties.

**Researcher:** Critics of judicial review suggest that judges lack incentives and are therefore ill suited to balance competing interests.

**Chief Justice:** I believe that the incentive of the judge is to enunciate the law. I think that is the best incentive one could have in determining constitutional issues. I recognize that the judiciary is not a legislative body, and the work of a legislative body is precisely to balance competing interests. The miracle is that the legislature balances them as well as they do because they are constantly being subject to barrages of dire predictions of total doom, if they do one thing rather than another. Still they must balance competing interests. They must balance these. But, I think the sole incentive of the judiciary is to enunciate the law and to declare what the law is--to declare what the law is as John Marshall said back in 1803 in *Marbury v. Madison*, I think is the source of their strength rather than a source of their weakness.

**Researcher:** Does judicial review ever constitute making law, then?

**Chief Justice:** The judiciary is limited to serving one case at a time so it doesn't have the legislative outreach that normally we associate with Congress. There are inherent limitations on the courts power, it would strongly maintain that it has no right to legislate, only tell you what the law is, not what it ought to be. Nevertheless, the Court has done some legislating—Miranda was a perfect example of judicial legislation when

the Court not only gave the rights, but specifically enunciated what those rights would be and exactly what the police had to do. Taking all of these things together I would say that the court is and has been conflicted about its role. It does not want to legislate. It wants to declare what the law is. It wishes to limit its function. It does not want to expand its function, but there are times that the court is forced into expanding its function, in order to create a legal concept that is workable. This is why when the court got into the area of segregation it got into activities such as appointing masters to run school systems. The court did this with reluctance and was eager to get out of that activity as soon as it could. The court desires to limit its activity and its power, but is often forced into exercising the power to achieve a result that must be obtained. Even though it does so reluctantly and of course it always has to be impelled by somebody who brings the litigation, somebody that comes before the court with a case or controversy that presents the issue and ultimately the court will decide that issue. If it was not for the person who brought the case it would never be decided.

**Researcher:** Well it is a wonderfully strategically effective system.

**Chief Justice:** Well, I think it is. I think it is a wonderful system. I think it is an extra-ordinarily effective system. Even though sometimes it has to be dragged into the controversy and I am sure as somebody who has been a judge for 52 years it may be the last thing in the world that you want to do is go in and decide this case in this tremendously controversial matter, but when it comes before the court it must be decided. And, that is the one thing in which the court differs from all other branches of government when a case in controversy is brought before the court within its jurisdiction it must decide it. It can't do what Congress can do. Congress can say well we won't consider it right now we will wait until next year we will assign it to a commission or we won't bring it to a vote. But, the court must decide. That is a significant feature of the court that the other branches do not have.

**Researcher:** Are there any specific processes or procedures in criminal or Constitutional law that should be modified as a result of the GWOT?

**Chief Justice:** I would not advocate any modification of any of our Constitutional principles in the sense of re-codifying or amending them on an ad hoc basis. Law enforcement personnel homeland security personnel may have to take whatever actions are necessary to protect against catastrophic disaster. For example, if we have a report or probable cause to believe someone has poured a toxic poison into the reservoir, we may need to take action that goes beyond the hope of prosecuting such an individual. We may have to take action to try to find out the source of this toxic poison and to take whatever action that is necessary to remediate the disaster that might occur. Under such circumstances it may be that the Miranda limitations might have to be somewhat diminished in order to find out what we need even though that may have an affect upon prosecution. Prosecution might not be the ultimate goal in that situation but responding to the catastrophe and trying to remediate as much as possible the disaster that would result.

## 5. Questions 20 and 21

*Q20: Modern terrorism—the September 11, 2001, terror attacks requires the modification of the ordinary processes of criminal law and procedure.*

*Q21: Modern terrorism—the September 11, 2001, terror attacks requires the modification of the ordinary processes of Constitutional law.*

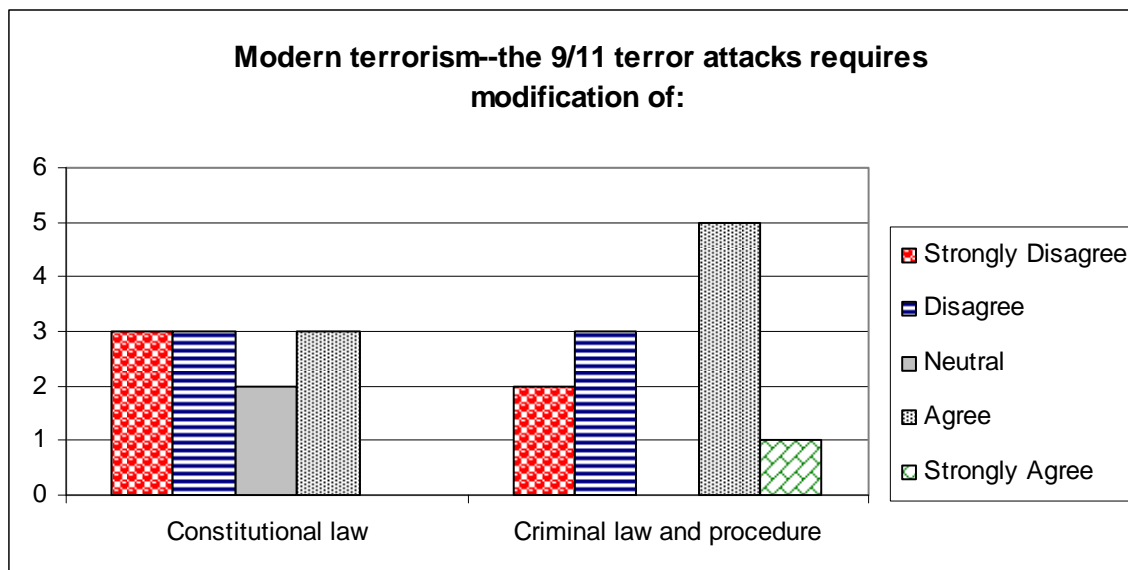


Figure 5. Supremes' responses to questions 20 and 21.

**Researcher:** Has the GWOT expanded the conventional definition of war?

**Chief Justice:** In the opinion of the Bush administration, we are engaged in sustained crises. We are engaged in a real occupation task in Iraq, and we are engaged in another occupation-war in Afghanistan as well as in a situation of confrontation with Iran, so yes we are, we are without question in a very difficult international situation, but no more difficult than the so-called Cold War was. It was a sustained thing from the end of World War II to 1989 when the wall came down and the Soviet Union began to dissolve--from 1944 to 1989, 45 years. There are those who would argue that that was a War on Communism. But, the term GWOT is a term that is somewhat difficult to define. The United States has been the victim of terror carried out by extremist organizations which we refer to as al Qaeda, and al Qaeda and other extremist organizations are dedicated to a program of terror and acts of terror against the United States of America, its citizens and its institutions. Now, luckily, we haven't had any recently, but in the past as you know, we have had attacks on the World Trade Center, we have had attacks at American embassies in Africa, we have had attacks on the naval war ship the USS Cole. And undoubtedly we might anticipate that there might be further attacks, wherever we are deemed to be vulnerable. And in spite of the best efforts at security, no nation, no person no institution is ever impregnable or invulnerable to a determined attack by a person or persons who are willing to give their lives in order to carry forth the attack.

**6. Question 19**

*Q19: Modern terrorism—the September 11, 2001, terror attacks, expanded the conventional definition of war.*

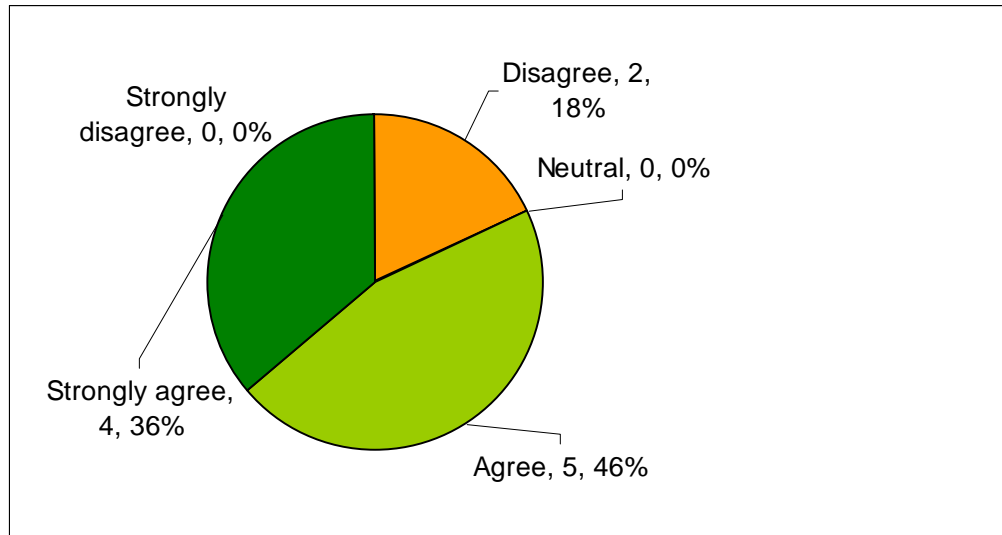


Figure 6. Supremes' responses to question 19.

**Researcher:** Under the GWOT paradigm, the terror threat is seemingly perpetual.

**Chief Justice:** At least the future of this activity can be perhaps best described as indefinite I do not know what we could do or refrain from doing that might cause these attacks no longer to take place. Because certainly on 9/11 we were not in Iraq, we were not in Afghanistan we had very little activity globally going on in terms of our armed forces being in place. We were perhaps criticized or subject to criticism by some nations in the Middle East because of a purported support for the state of Israel. We certainly might have been vilified for that but generally speaking our activities in the area certainly the Middle East were limited at the time we had these attacks carried out against us. We are much more involved now, and actually the attacks since we have been involved mercifully have not occurred in our homeland but that does not mean that they will not.

**Researcher:** Balancing civil liberties—making those determinations, when faced with an indefinite GWOT . . . when are we at peace, as opposed to war? It gets murky and complicated under the GWOT paradigm.

**Chief Justice:** --very blurred. By many definitions we are not at war, at the present time, in the sense when we were at war with the empire of Japan, Germany and Italy during World War II, of course we were never at war with the Soviet Union. But

we were always on the brink of conflict we were in danger of conflict and at the present time there is no likelihood of any foreign power currently that seeks to establish sovereignty over us to overthrow our government and to conquer the United States. What these terrorists are attempting to do is to create chaos in various places throughout the world and what their ultimate goal is, is not very clear--what their ultimate goal is not clear. Do they wish to take over Iraq I am not even sure of that--I am not even sure of that? You have a Shiite government in Iraq. Presently the Shiite clerics also govern Iran, which is the neighboring government that might possibly seek to have more influence in Iraq, if we were to leave. The Sunnis in Iraq are in the minority but they did pretty much run the government under Saddam. Most Muslims are Sunnis throughout the world, Shiites are a minority though they form the majority in Iraq and they form the majority in Iran, Syria, and Saudi Arabia are Sunni. I don't know what the objective of al Qaeda could be, it may have had at one time some desire to restore Sunni dominance in Iraq whether it maintains that desire I do not know Osama Bin Laden is not exactly articulate in expounding upon his vision of what the government of Iraq should be. He certainly expounds on the fact that the United States is terrible, and the great Satan, and that the Iraqi government is ineffective and illegitimate. But he is a tearer down rather than a builder up. And I don't know what his vision is of an Iraq that he would like to be--I don't know that and I don't know that anybody else does. But there are builders and there are destroyers, and I think that Osama Bin Laden is a destroyer.

**Researcher:** --for the sake of destroying

**Chief Justice:** --right, he might have some ideas of an Islamic state he wishes to purge the state of secular influences particularly influences coming from the West. I think he would like a clerical state in Iraq. Of course, he isn't even an Iraqi. He comes from Saudi Arabia and I think he has very grave disagreements with the government of Saudi Arabia and the fashion with which they conduct themselves. He is sort of an Islamic purist and is very much against any Western influence. He is against secular influence. He is against obviously doing things that the Islamic religion prohibits such as

drinking alcohol and I suppose inappropriate conduct by both men and women so he is sort of a puritanical man of mystery. And what is the objective of al Qaeda at the present time other than to create chaos, is not clear.

**Researcher:** Perhaps there are some advantages to not knowing. It can temper United States response to the release of Osama Bin Laden video tapes--whether we increase the threat level. In other words, each time Osama Bin Laden or al Qaeda does something short of an actual attack should not necessarily require our government to respond in any significant way. Over response can have the effect of individuals not taking risks or threats seriously because of continued warnings or fear mongering. Over response, can threaten normalcy if we don't temper our responses to terrorism then incrementally Osama Bin Laden would create chaos.

**Chief Justice:** If he can drive us into a panic he has succeeded and we can panic in various ways. We can panic by, let us say, violating civil liberties on a broad scale. We can panic by brutality. We can panic by our activities in regard to other nations, our methods in dealing with people in Iraq, our methods in dealing with people in Afghanistan in all of these areas our conduct, if we panic in response to al Qaeda or Osama Bin Laden he has achieved his objective. Because I don't think he wants to conquer the U.S., I don't think he would even expect to do so he probably wants to drive us out of pretty much the Islamic world. He would like us to leave even Saudi Arabia where we do have people--some bases there, and I think he would like us to leave Iraq and he would probably like us to leave Afghanistan. I think that would be his objective.

**Researcher:** Do you think some of the United States responses to 9/11 were to address the psychological impact of the event. Al Qaeda doesn't appear to possess the ability to take over America or Iraq.

**Chief Justice:** I think that is true. What al Qaeda can do is establish, is to create chaotic conditions. If they were to have a series of attacks right now, for example it is very unlikely that al Qaeda can take over the government of Iraq. But they can make that government, let us say, ineffective by constantly creating furor, chaos--by making markets unavailable, blowing up oil transportation lines, doing things to make the

economy in turmoil. So they are not one, an organization that seeks to take over the government, but only to create chaos--to make the government ineffective. What that would lead too is very difficult to predict. If you were going to take over or another country was to take over Iraq, it would probably be Iran or somebody moving in to end the chaos. For one thing, that human beings will not abide for a long time is chaos. They will accept tyranny rather than anarchy and have done so throughout history.

**Researcher:** Part of America's challenge, then, in creating a culture of security is to deal with the psychological aspects of terrorism and the threat of terror.

**Chief Justice:** Indeed, enormously important, in this area perception becomes reality. A government cannot be effective unless it is perceived to be effective. And, a threat to the effectiveness of government is a threat to government itself, very definitely. I think we have to recognize that the emphasis on security comes from the most basic of human instincts—self—preservation. Security and self-preservation are closely related and very few human beings wish to give up security they also value their liberties and they want to retain them sometimes they forget about the liberty of somebody else who is, in their opinion, threatening their security. Therefore, they are willing to compromise the liberty of some body else, they consider to be a danger to them without realizing that when they take away the liberty of someone else they are endangering their own liberty. We cannot say that the liberties of someone else are irrelevant to us because they are all relevant. Sometimes we may forget. As when we imprisoned thousands of Japanese, the attorney general of the state of California at that time was Earl Warren who later became one of the greatest of all civil libertarians. At that time, he was not opposed to imprisoning the Japanese, because he regarded them as a threat and we were in a panic following the attack of December 7, 1941. I was in the Navy at the time and I remember the, how would one say, the outpouring of indignation and fear because many believed that the attack would be followed up by an invasion of California. This of course is why they decided that the Japanese people who turned out to be completely inoffensive--there was not a single incident of sabotage by a Japanese American during the entire course of



World War II, but the fear existed it was the perception and self-preservation, the concept of self-preservation that caused Franklin D. Roosevelt to issue that order. And many Californians, in fact, most Californians were very much in sympathy.

## 7. Questions 15 and 16

*Q15: There is value in permitting indefinite detention of U.S. citizens suspected of terrorism without requiring proof beyond a reasonable doubt that the suspect really is a terrorist.*

*Q16: There is value in indefinite detention of U.S. citizens suspected of terrorism so long as there is a persuasive showing before a judge in an adversary hearing that the suspect really is a terrorist.*

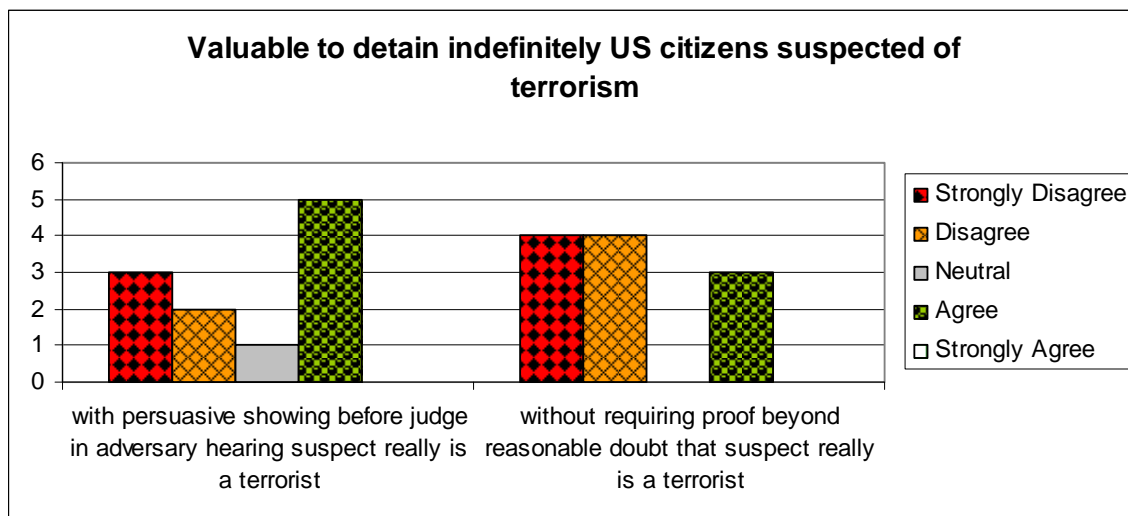


Figure 7. Supremes' responses to questions 15 and 16.

## 8. Questions 17 and 18

*Q17: There is value in permitting indefinite detention of non-U.S. citizens suspected of terrorism so long as there is a persuasive showing before a judge in an adversary hearing that the suspect really is a terrorist.*

*Q18: There is value in permitting indefinite detention of non-U.S. citizens suspected of terrorism without requiring proof beyond a reasonable doubt that the suspect really is a terrorist.*

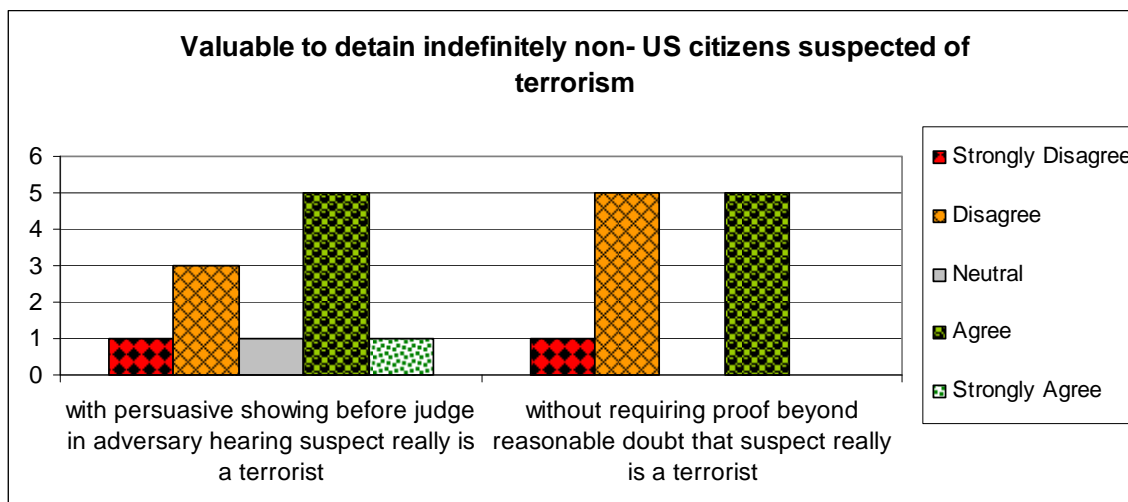


Figure 8. Supremes' responses to questions 17 and 18.

**Researcher:** Do you think that because the line of interment cases have not in fact been overruled and since some homeland security policies appear to allow racial or ethnic profiling, we could have a reoccurrence?

**Chief Justice:** We could, we could . . .

**Researcher:** An executive order for detention based on race or ethnicity goes beyond using race or ethnicity for investigative purposes. It is law versus policy--so a consideration of equal protection . . .

**Chief Justice:** The obligation of government is to prove there is a reason for detention and to do it not because of racial profiling, ethnic profiling, or overriding belief that anyone that might be termed a Muslim is an infiltrator. You may need racial profiling to begin an investigation. It may be a factor that leads a law enforcement authority to investigate. But it is not and never should be a reason for imprisonment or detention. You investigate. And, then you get probable cause to believe that a person is an enemy or is an insurgent or is a terrorist. Then of course you take whatever measures are necessary to protect the community. While racial profiling may be a factor in the beginning of the investigation, it should not be the end of the investigation. Punishment based on race or ethnicity is absolutely unacceptable.

## 9. Question 22

*Q22: A response to modern terrorism—September 11, 2001 terror attacks requires as a matter of policy racial and/or ethnic profiling.*

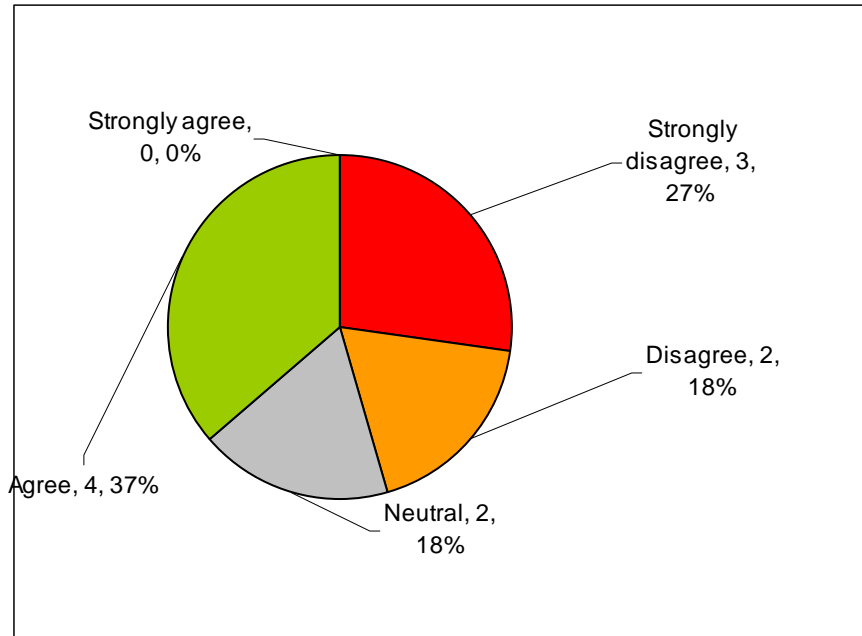


Figure 9. Supremes' responses to question 22.

**Researcher:** It would behoove states to ensure their policies address the use of race and ethnicity before the next attack.

**Chief Justice:** I agree. We must draw a distinction between circumstances that justify suspicion as opposed to circumstances that justify detention. Surveillance based upon suspicion may very well be justified. Detention would require something more than mere suspicion. And, then, of course, we have that other level reasonable suspicion that might cause you to confront the individual and talk to the individual and of course after that discussion you might go to another level. But I think that the kind of generality that may cause us to become suspicious is not sufficient for us to detain that individual, it may be sufficient to take the next step of surveillance or even questioning but not detention.

## 10. Questions 26 and 27

*Q26: A response to modern terrorism—the September 11, 2001 terror attacks can require as a matter of policy clandestine surveillance of non-U.S. citizens.*

*Q27: A response to modern terrorism—the September 11, 2001 terror attacks can require clandestine surveillance of U.S. citizens only as a matter of law.*

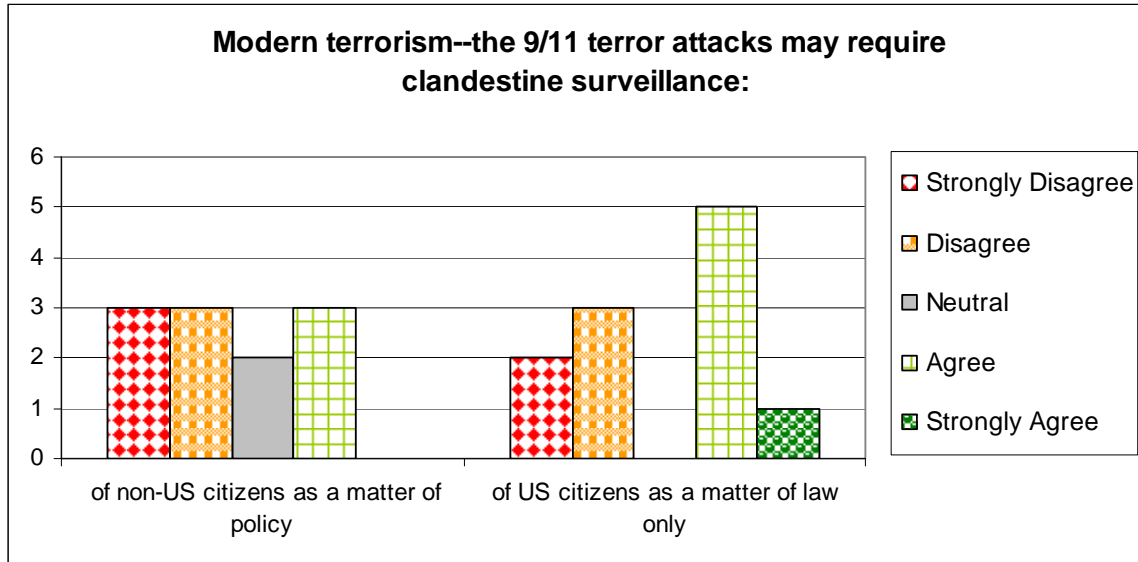


Figure 10. Supremes' responses to questions 26 and 27.

**Researcher:** It is a question of what factors go into allowing one to be held permissibly or legally detained . . .

**Chief Justice:** We do have the standard of probable cause. And I think that is the standard that should be maintained to the extent that we can do so. That is the standard that has withstood centuries of time. And I believe that valuing individual liberty can still be maintained while we spend a great deal of time and effort on guaranteeing the security of our nation and our community and our people. Because without security there can be no freedom and without freedom security becomes tyranny. Just one little story there is a case called *Entic v. Carrington* in which the agents of George the III were sued for having broken up a small newspaper. The perpetrators were sued for trespass. Lord Camden presided, found the agents of the king were guilty of

trespass, and awarded damages. Now, had there been a Lord Camden in the Colonies there might not have been a revolution. Lord Camden exercised his judicial power even against the agents of the king in England, but there was no lord Camden in the Colonies but it has sometimes been suggested that if there were a lord Camden in the Colonies there might not have been a revolution and the Colonies might have remained part of the British Empire, so, that in some way the respect for liberty and the rights of the individual can preserve the state.

**Researcher:** That speaks to a cost benefit analysis, what is the cost to the state or to our system of government by implementing certain public safety and security measures balanced against the benefit. What is the benefit to liberty?

**Chief Justice:** Constantly, we must balance those liberties, we have been doing it for more than 200 years, and I think we should continue to do it to the best of our ability. The story of Lord Camden is telling regarding the role the judiciary in balancing civil liberties. The judiciary has an enormous role. The judiciary is the guardian of the individual liberty, as well as being, of course, the guardian of the security of the community. It has both roles, but the judiciary is perhaps more oriented toward judicial liberty than the executive branch. I will not say more than the legislative branch, but the executive branch, which tends to be more authoritarian in its approach.

**Researcher:** Why is that do you think?

**Chief Justice:** Because the executive must get things done and when you want to get things done, you want your commands to be obeyed

**Researcher:** And ask forgiveness later.

**Chief Justice:** Every governor wants to be a CEO and is disappointed when he cannot react like a CEO. The commanding officer wants to be obeyed. The commander in chief wants to be obeyed. The judge, of course, wants to be obeyed too, but after a series of safeguards is adhered to.

**Researcher:** Some scholars argue an order suspending or curtailing civil liberties should only take place during more clearly defined national emergencies as opposed to the GWOT.

**Chief Justice:** That is the traditional view. The Constitution itself sets forth that a right of habeas corpus can only be suspended in case of rebellion, national emergency, invasion, and yes the general idea is that civil liberties of which habeas corpus is one, would only be curtailed when absolutely necessary and not as a routine matter. In general we look, we should look with great repugnance at curtailment of civil liberties, and [curtail civil liberties], only to the extent, that curtailment is absolutely essential.

## 11. Questions 4 and 5

*Q4: During times of national emergencies, civil liberties should yield in favor of public safety/security measures.*

*Q5: During times of national emergencies, civil liberties must yield in favor of public safety/security measures.*

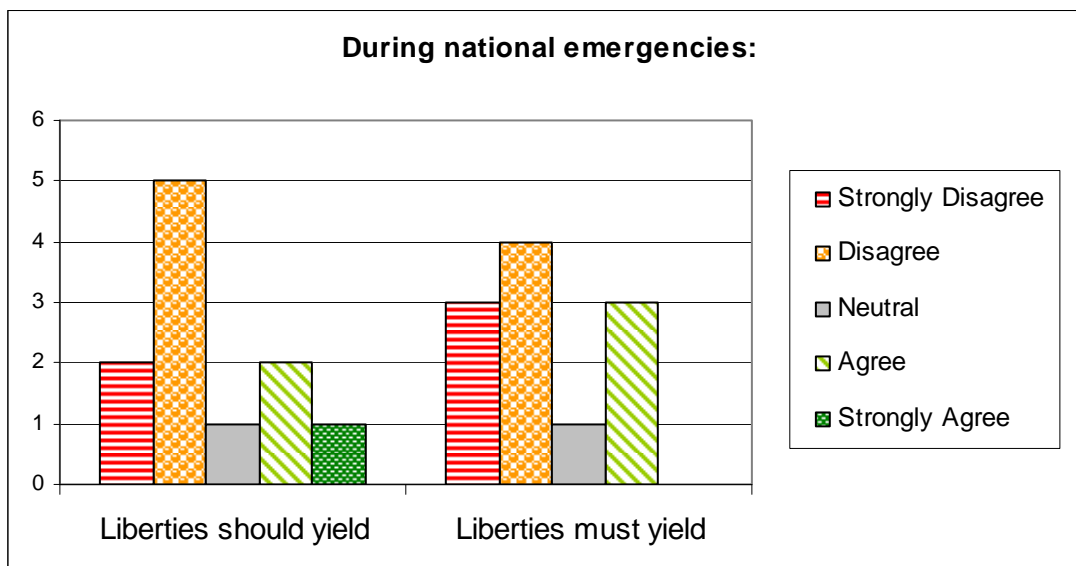


Figure 11. Supremes' responses to questions 4 and 5.

**Researcher:** It is challenging to make those determinations facing an indefinite GWOT, and where the terror alert system has been raised since 9/11.

**Chief Justice:** We have an example of course of the constant fear of acts of terrorism best illustrated by our going into an airport and being searched. Taking off our shoes, perhaps our belts, and other accouterments, we are limited to what we can carry aboard a plane, limited as to what we can have on our person. These limitations have existed for a quite a long time and they are not likely to diminish in the future. They are certainly matters of great inconvenience, but I believe that most citizens of the United States and most people visiting the United States are willing to undergo these restrictions on our right to be left alone . . . in hopes for the resulting safety and lack of fear that might otherwise not exist if we were not subjected to those restrictions. Even though each of us feels that, he or she is not likely to commit any act of terrorism. Certainly [there is] no idea in my mind to commit any act of terrorism, but I am willing to undergo these searches as a part of a general system to prevent acts of terrorism from occurring . . . I suppose I would have to describe it [preserving liberty] as a delicate balance. We are willing to accept some limitations on our civil liberties, our right to be left alone as I think it has been described in order to achieve as much of a degree of safety as we can. But for the same reason, presumably, there are some limitations on what we would be willing to accept, and there are also limitations--a cost benefit analysis of various means of national security or local state security. You have perhaps on either side extremists some extremist would not wish to have any liberty impairments; on the other hand, some extremist in the law enforcement area would want to overcome all liberties. Both extremists, let us say, are supporting a position that would be illogical, extreme and undoubtedly unsuccessful. If you suspend all liberties, you would still not achieve security. If you interfered with utterly--utterly no liberties, you might very well be inviting acts of terrorism that otherwise would not occur--such as our airport check, such as hopefully checks on cargo coming into the U.S. to look for nuclear materials matters of this kind. We have to realize that a man with a brief case could hold a nuclear weapon, if we say that you can never look in a suitcase, and we fail to expose the suitcase containing the nuclear weapon we might very well have overlooked the opportunity to

prevent that occurrence. So, it is constantly a balance, and extremes on both sides should be avoided, we should take a rational hopefully intelligent point of view to maintain civil liberties to the greatest extent that we can and at the same time provide as much protection against possible acts of terrorism we can achieve in a free society.

## 12. Question 8

*Q8: Public safety/security measures must increase as the terror threat increases*

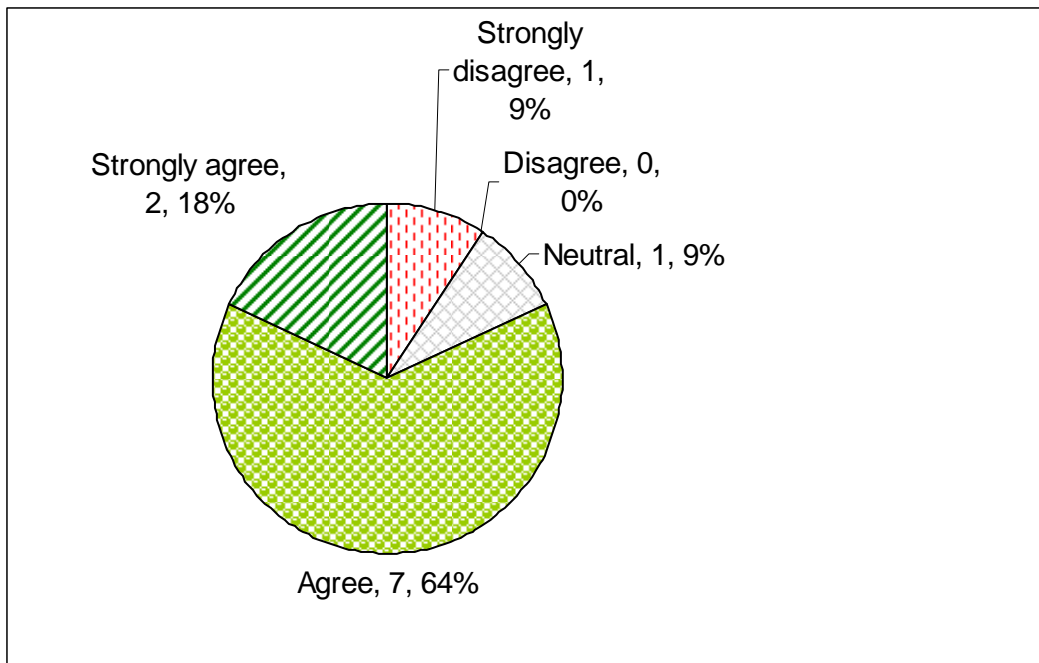


Figure 12. Supremes' responses to question 8.

**Researcher:** It is a social experiment, the balancing that is required it would seem we would have to allow some safety and security measures to be implemented and to give them time to see the results because the consequences of not taking the actions in the first instance would be far too great.

**Chief Justice:** I believe that is true, I believe that is true. Security for its own sake is perhaps as dangerous as no security at all. We have to make sure that there is a good fit a good connect between the security measures and the danger to be apprehended. And I suppose for example even in our airport security checks having octogenarian



grandmothers take off their sneakers may be of very little help in protecting us against violence even though, some security analysis would probably say it has some. Again, it is this delicate balance and you have to use an intelligent cost benefit analysis in determining what measures--security measures should be permitted and what measures should not be permitted.

### 13. Question 3

*Q3: An essential element to consider when balancing the competing interests of civil liberties and public safety/security measures during times of national emergencies is whether sufficient time has passed to determine whether the public safety/security measures have served to reduce the terror threat.*

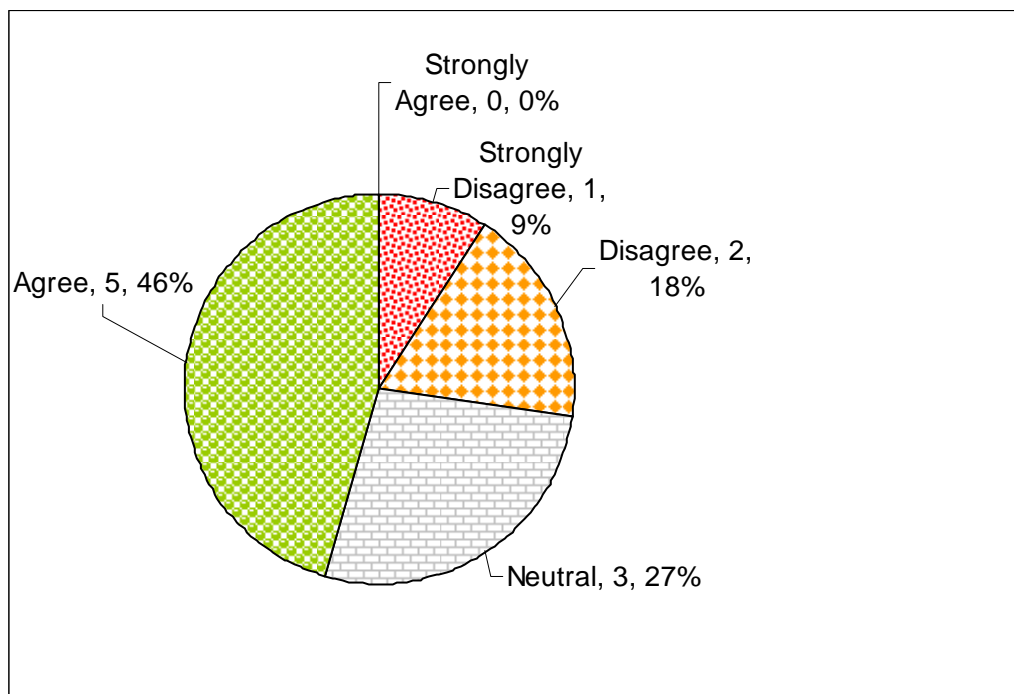


Figure 13. Supremes' responses to question 3.

**Researcher:** So the goal is to implement public safety security measures that are successful, but not unnecessarily harmful to the liberty interests.

**Chief Justice:** To the extent possible, yes. We should protect the liberties to the greatest extent that our national security will permit and we should diminish those liberties only where absolutely essential to our security and not on an arbitrary basis.

Because through much of the history of humankind liberty has been sacrificed to security. In medieval times, the Lord of the Manor was permitted to demand the most outrageous obedience from his serfs and retainers in return for protection. Much of the history of humankind has been the acceptance of tyranny in order to avoid chaos, in order to avoid attacks both domestic and foreign and it is only really in the last two centuries that humankind has emerged from a general aura of tyranny. In 1787 when our Constitution was promulgated tyrants ruled nearly all the world. They may have been benevolent despots but they were despots nonetheless. The Habsburgs, Romanovs, ruled much of the western world. The Ottomans ruled pretty much all the Islamic world at the time that our Constitution was adapted, so tyranny was the order of the day and this was why many people who were thoughtful did not believe that the American experiment would succeed. Fortunately, it did and we have succeeded for two centuries in being a model to the world for freedom and security. We have to try to retain that model and fight for its continued existence and we must support obviously, what is necessary for that continued existence, but the continued existence in the form that we have known not abandoning the form if we can possibly avoid, in fact we must not abandon that form.

#### **14. Question 2**

*Q2: An essential element to consider when balancing the competing interests of civil liberties and public safety/security measures during times of national emergencies is whether alternative less harmful (to liberty) public safety/security measures may be implemented.*

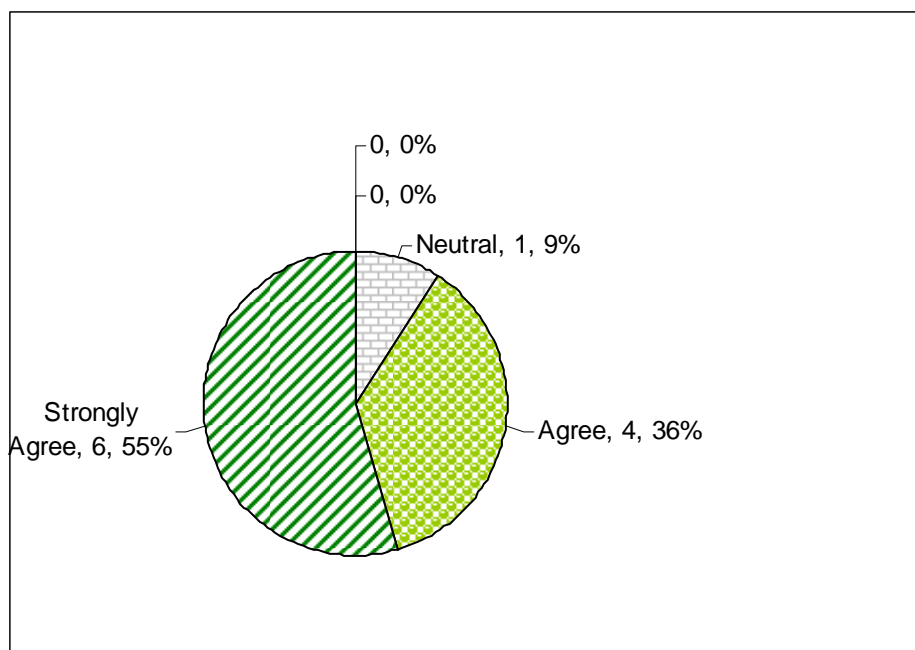


Figure 14. Supremes' responses to question 2.

**Researcher:** Public safety and security measures should then serve a dual role in that they protect against terror but must preserve civil liberties; is that the message America should send to the world.

**Chief Justice:** I would certainly hope that the security measures would do both. I would hope that they would do both and that should be the objective of all who are in charge of that aspect of our society and government.

## 15. Questions 9, 10, 11, 12, 13 and 14

*There is value in conferring constitutional rights on:*

*Q9: Known terrorists*

*Q10: Known terrorists only if they are citizens of the U.S.*

*Q11: Suspected terrorists*

*Q12: Suspected terrorists only if they are citizens of the U.S.*

*Q13: Suspected terrorists only to protect the innocent*

*Q14: Known terrorists only to protect the innocent*

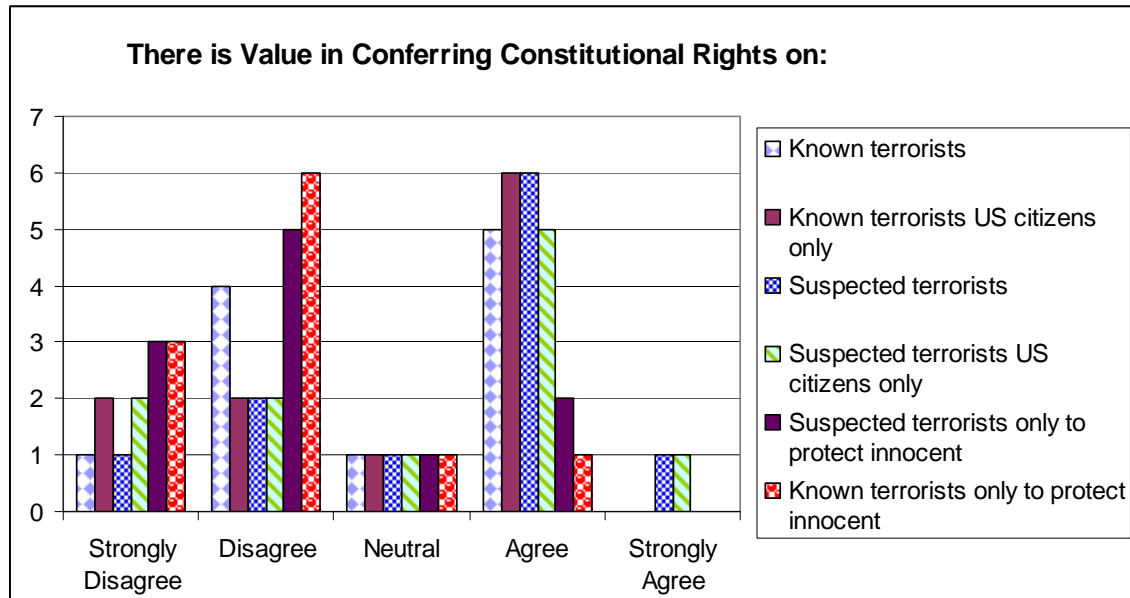


Figure 15. Supremes' views on questions 9, 10, 11, 12, 13 and 14.

**Researcher:** Has GWOT blurred lines between HLDS and national security?

**Chief Justice:** There is always a tension between civil liberties and national security in the context of violence and/or war. That tension was perhaps most amply illustrated by our own civil war of 1861 to 1865. No lesser person than Abraham Lincoln suspended the writ of habeas corpus. In *ex parte Milligan* after the war was over, the court decided President Lincoln had acted illegally that he did not have the power to suspend the Writ of habeas corpus. Most recently, the Supreme Court of the United States has determined that the detainees in Guantanamo are entitled to the privilege of the Writ. Habeas corpus even though purportedly suspended by Congress has been determined to be still operative even in the Guantanamo base, which is in a sense under the sovereignty of Cuba though we have de facto control of that area, and habeas corpus will run there. Now this tension will continue to exist, but if a person were to come before a state or federal court, I believe that that person would be entitled to the guarantees which the constitutions give of right to counsel, fair trial, to be tried in accordance with the principles of the common laws as well as the principles of our state and federal constitutions. There might be some difficulty in regard to classified information that would have to be determined on an ad hoc basis. But generally speaking

not even the United States Supreme Court has tackled that question about classified information, except to refer to its most recent case, but to the extent that it would be possible to do so, the rights that attach to an individual in respect to being tried for a crime of which he or she is accused would have to be given maximum protection as the Constitution requires. National security may require certain limitations on the release of classified information. Then the court would have to try to balance those necessities as fairly as possible.

**Researcher:** Should a state judiciary routinely read intelligence reports?

**Chief Justice:** For the most part the state judiciary would probably not be involved with federal intelligence reports. Because they would not generally become an issue in a state proceeding, but to the extent that they might and to the extent that these reports would be available to the state courts and to the extent that they would be relevant to the case at issue I would think that the court would have to read that report in camera to determine whether that report would become part of the public record. This happens more frequently in the federal courts.

**Researcher:** What is your understanding of coercive interrogation techniques?

**Chief Justice:** Well, I suppose that to define it, one would say that a coercive interrogation technique would be a technique, which is designed to obtain information through the use of force or the threat of force, or torture or the threat of torture and that it is a form of interrogation that has been widely used throughout the history of mankind, but which has generally been discouraged in the United States since 1966, since the Miranda decision.

## **16. Questions 23, 24 and 25**

*Q23: Coercive interrogation techniques do not constitute punishment during times of national emergencies.*

*Q24: There is value in permitting coercive interrogation techniques during times of national emergencies only when the value of information sought is great.*

*Q25: Coercive interrogation techniques during times of national emergencies do not constitute punishment only when no other method would work quickly enough to be effective.*

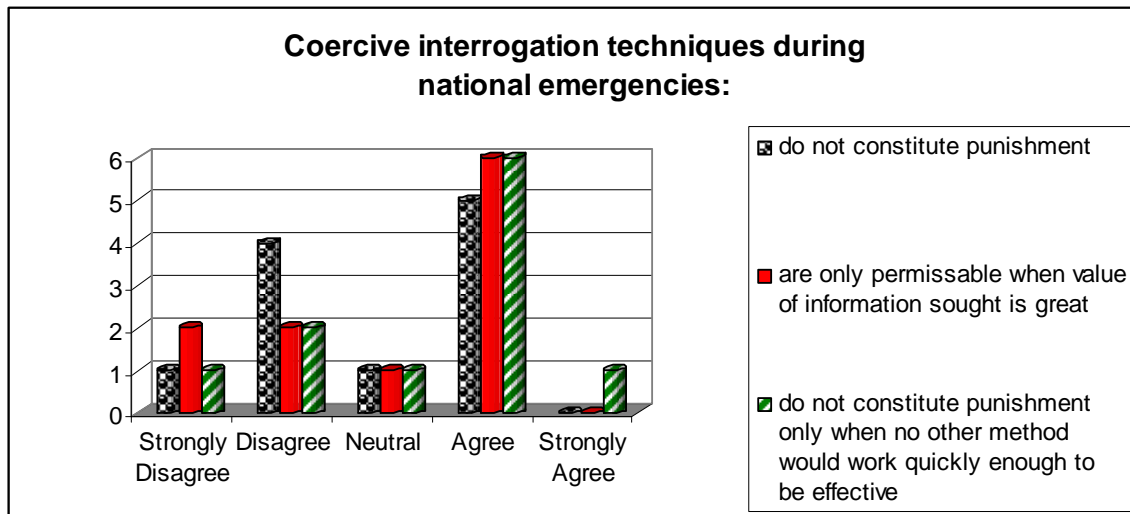


Figure 16. Supremes' responses to questions 23, 24 and 25.

**Researcher:** Do you think there is a difference between using coercive interrogation techniques under the umbrella of national security as opposed to homeland defense and security?

**Chief Justice:** Well I think there is a difference between using coercive techniques to avoid catastrophic disaster. As I mentioned to you, simply attempting to build a case for prosecution under the criminal law is different, I think that if we are dealing with attempts to avoid catastrophic disaster we may have to relax some of the limitations on law enforcement personnel for survival.

**Researcher:** Intelligence is needed on the state and federal level.

**Chief Justice:** In order to respond to threats to national security intelligence is a vital element, we cannot defend ourselves without intelligence whether it is against a foreign threat or a domestic threat, if we are unable to gather intelligence we are in a sense fighting blindly and fighting blindly is equivalent perhaps to not fighting at all. Therefore, the gathering of intelligence both foreign and domestic is essential to the security of the nation. The methods of gathering that intelligence are of course subject to some restraint. Including the fourth and fifth amendments, but consistent with those

restraints I would think it appropriate for both the national government and state police organizations to gather all the intelligence that they possibly can in a legal manner that would tend to protect the state and the nation against violent terrorism and illegal actions. Somebody I think it was Justice Jackson mentioned the Bill of Rights is not a common suicide pact. We must protect ourselves. We must preserve ourselves. But in doing so we must go no further than the catastrophe requires. We cannot use these techniques capaciously, arbitrarily but only when they are absolutely necessary to our survival. The fact that we were champions of individual liberty, individual freedom and that we extended those freedoms to even aliens in our midst and to aliens who came under our control. Now of course from time to time we deviated from that high moral status when we imprisoned the Japanese during World War II, thousands of Japanese were imprisoned without any basis other than ethnic or racial origin. We departed from those principles, certainly recently detaining people without proving that they are enemy combatants and where we do not have reasonable or probable cause to believe that they are enemy combatants.

**17. Question 30**

*Please check the most important factor(s) that you believe are necessary to consider when determining whether to grant a habeas petition of a suspected terrorist detainee during times of national emergency*

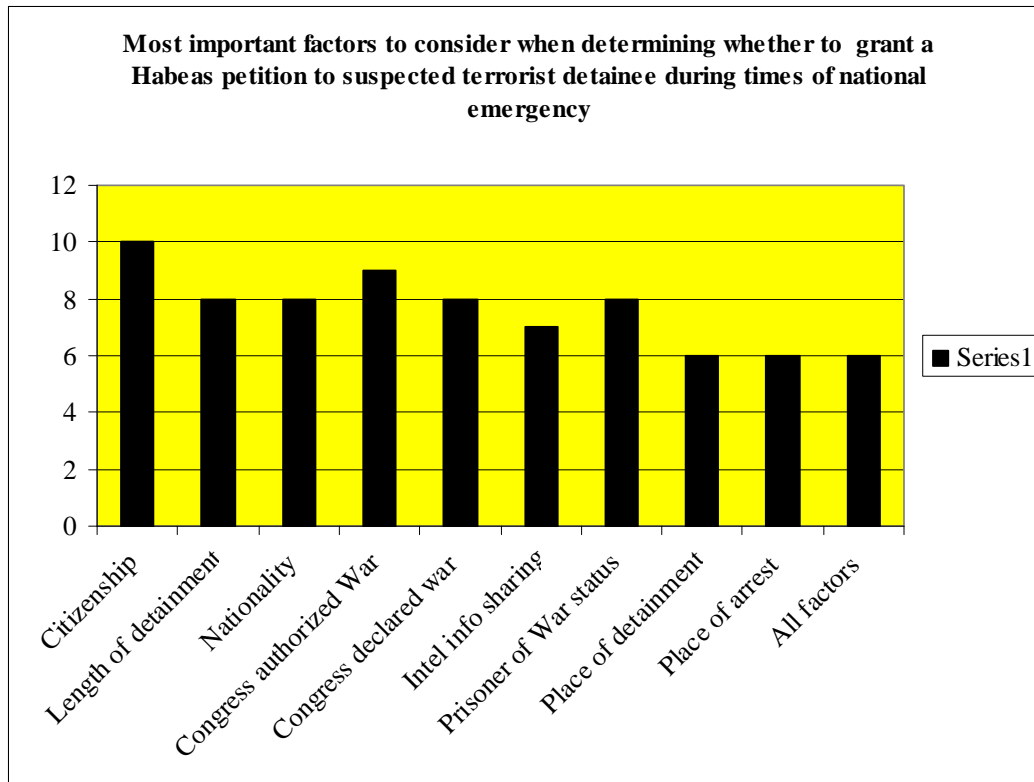


Figure 17. Supremes' responses to question 30.

But, generally speaking throughout World War I, World War II and the Cold War, in spite of aberrations from time to time, we emerged from those terrible conflicts with our institutions still strong our institutions still respected and to a great extent admired by the rest of the world, at least by thoughtful members of the rest of the world. It is very important for us to retain that moral leadership. What we must do is to retain the basic respect for human liberty and human rights that are essential to our system of government because if we lose that focus, that compass, then, of course, the terrorists have succeeded and we are no longer the country that we wish to protect.

*July, August, October 2008*



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## **V. DRAWING CONCLUSIONS AND IMPLICATIONS FOR FURTHER RESEARCH**

### **A. INTRODUCTION**

As America and her allies attempt to secure against the incomprehensible: terrorism, they must call on the collective resources of their people and institutions to wage a war of winning ideas, ideas that will not compromise or undermine her democratic principles but rather ideas that embody a contextualized freedom that respects human dignity.

This thesis has sought the addition of ideas on what factors are essential to consider when balancing competing interests, public safety/security measures and civil liberties during the global war on terror. It has done so, in part, by inviting the reader to reason critically to ground their Socratic questioning in empirical data directly from judicial officers of constitutional courts, State Supreme Court Justices. It has also sought to add to the myriad of voices calling to transcend the debate about whether judicial review is unnecessary, and democratically illegitimate as well as a debate that led the researcher to identify three hypotheses to guide the reader's critical assessment on whether or how judicial review is material and relevant to democracy's quest to reduce terrorism, and to provide the researcher's concluding thoughts.

In short, the hypotheses evoke thought on whether a constitutional court's power to exercise judicial review is democratically illegitimate as charged, because it precludes public participation in governing through elected representatives. In addition, they ponder whether judicial review serves a vitally important strategic function of coordinating peaceable public participation in a democracy, and finally, whether judicial review performed by an independent judiciary promotes a contextualized democracy that enhances a sovereign's legitimacy and can serve to reduce terrorism.

In this conclusion, the researcher seeks to highlight that because judicial review offers an alternative to the sword, it is material and relevant to democracy's quest to reduce terrorism. Judicial review and the views of the Supremes can serve as a model for

regions testing liberalization, regions known not for where terrorist strike, but from where terrorist activity originates,<sup>155</sup> of key factors to consider when balancing liberty and security interests to preserve both individual freedoms and a sovereign's legitimacy.

## **B. JUDICIAL REVIEW AND REDUCING TERRORISM**

### **1. Counter-majoritarianism Hypothesis**

Judicial review inveighs against popular constitutionalism (e.g., it precludes public participation in creating constitutional law through action in politics) by voiding political branch action. Hence, judicial review is illegitimate, irrelevant and immaterial to democracy's quest to reduce terrorism.

*A constitutional court's power to exercise judicial review is democratically illegitimate because it precludes public participation in governing through elected representatives and is therefore irrelevant and immaterial to democracy's quest to reduce terrorism.* There are differences among non-judicial review theorists but one shared belief is that judicial review is dangerous in a representative democracy. They believe judicial review constitutes an illegitimate power-grab. A power-grab that alienates the public from its government by seizing responsibility for protecting rights away from duly elected executive and legislative representatives and transferring it to unaccountable judges.<sup>156</sup> Non-judicial review theorists question the necessity, legitimacy, and competency of judicial review. Alleging judges cannot exercise the considered constitutional judgment necessary to balance competing interests because the Constitution provides no process,<sup>157</sup> or because judges lack incentives,<sup>158</sup> and in a functioning democracy, judicial review is an "insulting form of disenfranchisement and a legalistic obfuscation of the moral issues at stake in our disagreements about rights."<sup>159</sup>

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<sup>155</sup> Kaye, "More Freedom, Less Terror? Liberalization and Political Violence in the Arab World More Freedom," *Less Terror*, 18-19.

<sup>156</sup> Hirschl, "Towards Juristocracy: The Origins and Consequences of the New Constitutionalism," 1. This belief continues although in 39 states, judges are elected. Chris Berdik, *Order In The Courts: When Judges Are Elected*, *Boston College Magazine* 68, no. 4 (Fall 2008): 96.

<sup>157</sup> Yoo, "Judicial Review and the War on Terrorism," *Judicial Review and the War on Terrorism*, 5.

<sup>158</sup> Tushnet, "Non Judicial Review," 466-467, 491-492.

<sup>159</sup> Waldron, "The Core of the Case against Judicial Review," 1406.

That said, non-judicial review theorists, Waldron, Tushnet, Yoo, and Hirschl, however, do not disavow the historic value and power judicial review has had as a legitimate function for sustaining America's democracy. Instead, they seek to diminish or foreclose the power of judges to exercise judicial review when they assert repeatedly that judges behave illegitimately when they perform judicial review and by asking repeatedly if judicial review is really necessary. Both knowledge and wisdom has gone into their arguments, but their arguments appear grounded in resentment of judicial power and unfortunately constitute an unnecessary distraction that directs attention away from much needed scholarly discourse of how an independent judiciary is material and relevant to democracy's quest to reduce terrorism.

What is more, similar to "the confusion surrounding the topic of leaders and leadership,"<sup>160</sup> which arises from a focus on "assumptions around 'position and status, process personality, behavior and relationships,'"<sup>161</sup> non-judicial review theorists focus on judges as people seizing power from elected leaders illegitimately, rather than focusing on the function of judicial review as a legitimate strategy for sustaining democracy by coordinating public checks against political branch action. Their mis-focus seeks to ensnare the debate over judicial review in a confusing circular argument: "legitimacy enables courts to act in a counter-majoritarian fashion, yet counter-majoritarian behavior threatens the legitimacy of courts."<sup>162</sup> When asked whether judicial review is counter-majoritarian, Chief Justice Weisberger stated:

Judicial review is not designed to be counter-majoritarian, unless it has to be. The court is not desirous of acting in a counter-majoritarian way unless the majority has impinged upon fundamental rights or has created a suspect classification.<sup>163</sup>

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<sup>160</sup> Joyce, "Can You Lead Me Now? Leading in the Complex World of Homeland Security," Thesis Paper, 22.

<sup>161</sup> Ibid., quoting Lesley Prince, "Eating the Menu Rather than the Dinner: Tao and Leadership" *Leadership*, 1 no. 1 (2005): 107; Pye, "Leadership and Organizing Sensemaking in Action," (the leader (person) often becomes confused with leadership (process) and outcome in terms of social influence are often over attributed to the influence of the leader." 35.

<sup>162</sup> Law, "A Theory of Judicial Power and Judicial Review," 77, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1112613](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1112613) (accessed December 2008).

<sup>163</sup> Joseph R. Weisberger, Chief Justice (Ret.), The Rhode Island Supreme Court, interview with the author, October 15, 2008.

Here, the Chief Justice emphasizes judicial review is a function that acts and moves where the situation requires. In other words, it is a process of leading in a democracy where the political branches or even the court itself has impinged upon fundamental rights. Like the Chief Justice, theorist Law, in analyzing judicial review, steers attention away from arguing over whether judges are replacing elected leaders and grounds the discussion in judicial review as a process of leading in a democracy. He champions judicial review as a strategic function for coordinating public participation in the political spaces judges operate. Law's analysis of judicial review as a process is akin to Pye's analysis of leading as "enacting, organizing, explaining, managing, and shaping collective movement/action/ing."<sup>164</sup> Law's entreaty resembles Pye's advocacy for advancing research beyond the topic of leadership and leaders to leading.<sup>165</sup> Law pushes for a post-counter-majoritarianism discussion<sup>166</sup> that frees the debate over judicial review from circular trappings, and charts the way for a post-counter-majoritarian discussion, which for purposes of this thesis, advances a public discourse about how judicial review performed by an independent judiciary is relevant and material to democracy's quest to reduce terrorism to ensue.

## **2. Post Counter-majoritarianism**

Judicial review serves the strategic function of galvanizing and coordinating public participation in the political spaces judges operate. Judicial review is relevant and material to democracy's quest to reduce terrorism because it provides a conduit to seek redress of legitimate grievances through nonviolent means.

- Judicial review serves a vitally important strategic function for coordinating peaceable public participation in a democracy.

Under Law's essay, the exercise of judicial review permits judges to gather reliable information at the behest of and on behalf of the public, to develop raw data from executive and legislative activities that form the basis of their alleged misconduct, and to use professional expertise that members of the general public are unlikely to possess to

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<sup>164</sup> Pye, "Leadership and Organizing Sensemaking in Action," 35.

<sup>165</sup> Ibid.

<sup>166</sup> Law, "A Theory of Judicial Power and Judicial Review," 77-87.

analyze executive and legislation activities for constitutional consistency,<sup>167</sup> and where necessary, to void legislative and/or executive action where it fails to pass constitutional muster.

When asked whether judicial review serves a strategic function that invites public participation in the political spaces judges operate, Chief Justice Weisberger responded,

Yes. Limits upon our constitutional actions cannot be discerned from random activities of millions of citizens who have not seriously considered the question of constitutional application. I think that it requires an organized professional oversight . . . . [However,] The activities of individuals in our society create a context in which judicial review takes place. In other words, the current of ideas has an influence without question upon judicial decisions . . . . [W]e have to recognize that under the law the court cannot go out and simply decide cases or questions in the abstract. They must await litigation to be brought by a party an individual or a group of individuals. They bring a question before the court for determination. The court just cannot reach out and decide issues unless people bring cases or controversies before them for adjudication and it goes up through the system. It starts out in a state or federal court and gradually winds its way up to the United States Supreme Court. But it is an individual who starts the process. If we take the outstanding case of *Brown v Board of Education* these were individual parents of no particular wealth prominence or political power they just brought a lawsuit. . . . The judiciary provides an alternative to violent resolution of disputes--that isn't just the Supreme Court of the United States, but the very function of the judiciary within our states, cities and towns across the nation it provides a peaceful resolution of disputes . . . . [J]udicial review serves as a traffic control type of operation.<sup>168</sup>

- So what “traffic” signals do the Supremes send as a point of convergence for potential public action against the government?

The Supremes signal, with eighty-two percent agreeing, that security measures must increase as the terror threat increases. Forty-six percent signal that considering whether sufficient time has passed to determine if public safety and security measures have served to reduce the terror threat is essential when balancing the interests with

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<sup>167</sup> Law, “A Theory of Judicial Power and Judicial Review,” 28, 32.

<sup>168</sup> Joseph R. Weisberger, Chief Justice (Ret.), The Rhode Island Supreme Court, interview with the author, October 15, 2008; Law, “A Theory of Judicial Power and Judicial Review,” describes how the courts are like traffic lights and explains judicial review is the “common signal;” the “focal point” upon which the public can “treat as the basis for acting against the government,” 51-57.

twenty-seven percent disagreeing and twenty-seven percent signaling neutrality. Sixty-four percent signal that liberty should not and must not yield to security, with twenty-seven percent of the viewpoint that liberty should or must yield to security, and eighteen percent signaling neutrality either way.

In sum, the public can take from this that a key factor to consider during national emergencies when balancing competing interests is whether the government has implemented security measures less harmful to constitutionally protected liberty interests, ninety-one percent of the Supremes share this view with nine percent signaling neutrality.

Moving along, eighty-two percent of the Supremes signal that modern terrorism, 9/11 terror attacks, has expanded the conventional definition of war. Even so, there is no consensus for modifying constitutions, by say, granting extra-constitutional authority to the political branches during national emergencies. Fifty-five percent of the Supremes signal that such expansion does not call for modifying Constitutions, the integrity of which eighty-two percent deem paramount. While twenty-seven percent signal modifying constitutions is required and eighteen percent signal neutrality on the issue of constitution modification and primacy.

- What are the Supremes' thoughts on modifying ordinary processes of criminal law and procedure during the GWOT?

The data reveals that modern terrorism requires modification, with fifty-five percent agreeing and forty-five percent disagreeing. Chief Justice Weisberger opines that, "Miranda limitations might have to be somewhat diminished" in response to modern terrorism irrespective of the effect on prosecutions where avoiding catastrophe and remediating resulting disaster is the ultimate goal. However, he cautions against using modern terrorism as a pretext for modifying laws to permit racial and ethnic profiling as a basis for imprisonment or detention:

The obligation of government is to prove there is a reason for detention and to do it not because of racial profiling, ethnic profiling, or overriding belief that anyone that might be termed a Muslim is an infiltrator. You may need racial profiling to begin an investigation. It may be a factor that

leads a law enforcement authority to investigate. But, it is not and never should be a reason for imprisonment or detention . . . . Punishment based on race or ethnicity is absolutely unacceptable.<sup>169</sup>

Of note, the data reveals forty-five percent of the Supremes signal that racial or ethnic profiling is not required even as a matter of policy, while thirty-seven percent signal it is permissible and eighteen percent are neutral. The data here may be of special interest to members of the Muslim and Arab community, progressive socially conscious lawyers and psychologists. Post 9/11, the horrific actions of 19 murderous terrorists amazingly, “were generalized to an impression of millions,” of Americans who embraced the notion some consciously other unconsciously that the actions of the 19 were representative of the larger Muslim and Arab populations.<sup>170</sup>

The Chief Justice speaking of the challenges associated with psychological effects of terrorism cautions against panic and urges against creating a culture of security that impinges on the liberty of *someone else*:

Security and self-preservation are closely related and very few human beings wish to give up security they also value their liberties and they want to retain them sometimes they forget about the liberty of somebody else who is, in their opinion, threatening their security. Therefore, they are willing to compromise the liberty of some body else, they consider to be a danger to them without realizing that when they take away the liberty of someone else they are endangering their own liberty. We cannot say that the liberties of someone else are irrelevant to us because they are all relevant. Sometimes we may forget. As when we imprisoned thousands of Japanese, the attorney general of the state of California at that time was Earl Warren who later became one of the greatest of all civil libertarians. At that time, he was not opposed to imprisoning the Japanese, because he regarded them as a threat and we were in a panic following the attack of December 7, 1941.<sup>171</sup>

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<sup>169</sup> Joseph R. Weisberger, Chief Justice (Ret.), The Rhode Island Supreme Court, interview with the author, August 20, 2008.

<sup>170</sup> McCauley, “The Psychology of Terrorism: Psychological Issues in Understanding and the Response to Terrorism,” in *Psychology of Terrorism*, 26-28.

<sup>171</sup> Joseph R. Weisberger, Chief Justice (Ret.), The Rhode Island Supreme Court, interview with the author, August 20, 2008.



Similarly, in warning against panic, Ickenberry and Mayer<sup>172</sup> posits that panic drove the Bush administration to, for the first time in history, routinely sanction, “government officials to physically and psychologically torment U.S.-held captives, making torture the official law of the land in all but name.” It is panic-inspired governmental policies, programs, and laws, which impinge upon the liberty of someone else that an independent judiciary exercising judicial review, can guard against; for example, permitting torture routinely, and permitting indefinite detention of non-U.S. citizens suspected of terrorism without requiring proof beyond a reasonable doubt.

- The Supremes signal there is limited value in permitting indefinite detention of non-U.S. citizens suspected of terrorism without requiring proof beyond a reasonable doubt.

Fifty-five percent disagree there is value while forty-five agree there is value. Significantly, fifty-five percent agree there is value in permitting indefinite detention of non-U.S. citizens so long as there is a persuasive showing before a judge in an adversary hearing that the suspect really is a terrorist while thirty-six percent disagree and nine percent are neutral. With respect to detaining U.S. citizens indefinitely without requiring proof beyond a reasonable doubt, sixty-three percent signal that there is no value and only twenty-seven percent signal that there is value. Whereas on the issue of whether there is value in indefinitely detaining U.S. citizens so long as there is a persuasive showing before an adversary hearing that the suspect really is a terrorist, the findings are statistically insignificant: forty-six percent of the Supremes agree and forty-five percent disagree, and nine percent signal neutrality.

What then is the clear signal? Although the standard of proof may differ, reasonable doubt versus persuasive showing, there is value in providing due process<sup>173</sup> for citizens and non-citizens alike where indefinite detention is at issue.

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<sup>172</sup> Ickenberry, “Liberal Order Building,” in *To Lead the World: American Strategy after the Bush Doctrine*, 98; Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*, 7-8.

<sup>173</sup> For purposes of this thesis, due process means providing a procedural opportunity for an accused to be heard before a court of competent jurisdiction.

- What about conferring substantive constitutional rights<sup>174</sup> on known or suspected terrorists?

The data shows that whether there is value in conferring constitutional rights on *known* terrorists is statistically insignificant: one percent. Forty-six percent agree there is value, forty-five percent disagree, and nine percent are neutral. However, the Supremes signal there is value in conferring constitutional rights on *known* terrorists only if they are citizens of the U.S. Fifty-five percent agree, thirty-six percent disagree, and nine percent signal neutrality. Further, eighty-two percent disagree that there is value in conferring constitutional rights on *known* terrorists *only* to protect the innocent, with nine percent agreeing there is and nine percent are neutral.

In short, those Supremes who find value in conferring constitutional rights on *known* terrorists, forty-six percent, would not limit constitutional application to *known* terrorists only where protecting the innocent was the case, adding to but disagreeing with the views of those Supremes who would find no value (forty-five percent) in conferring constitutional rights on *known* terrorists, at all.

Conversely, the Supremes signal there is value in conferring constitutional rights on *suspected* terrorists, sixty-four percent agree, twenty-seven percent disagree, and nine percent are neutral. While fifty-five percent agree there is value in conferring constitutional rights only for *suspected* terrorists who are citizens of the U.S., thirty-six percent disagree and nine percent are neutral. Here, nine percent of the fifty-five percent of Supremes who agreed there is value in conferring constitutional rights on *suspected* terrorists, strongly disagreed there is no value in conferring constitutional rights on non-U.S. citizens, adding to but disagreeing with the views of those Supremes who would find no value (twenty-seven percent) in conferring constitutional rights on *suspected* terrorists, at all. In addition, seventy-three percent disagree there is value in conferring constitutional rights on *suspected* terrorists only to *protect the innocent*, whereas eighteen-percent agree there is value and nine percent are neutral. Lastly, the nine

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<sup>174</sup> For purposes of this thesis, substantive constitutional rights means those rights embodied in the Bill of Rights, common law and legislative acts, upon which the court relies to adjudicate as Crane notes *supra* at page 35 “conflicts between different people exercising their rights” or the adjudication of the legal relationship between people and government.

percent who found value for *suspected* terrorists only to protect the innocent, found no value in conferring constitutional rights on *known* terrorists only to protect the innocent.

What clear signal does the data reveal? There is value in conferring constitutional rights on *suspected* terrorists regardless of *protecting the innocent* and regardless of *citizenship*. That said, and interestingly, the Supremes signal that gathering intelligence using clandestine surveillance to secure America is permissible. Eighty-two percent agree that a response to the 9/11 attacks can require clandestine surveillance of U.S. citizens but only as a matter of law, with nine-percent disagreeing and nine-percent neutral; while eighty-two percent agree that clandestine surveillance of non-U.S. citizens is permissible as a matter of policy, and eighteen percent disagree.

What is more, on the issue of constitutional rights and coercive interrogation, the data reveals that coercive interrogation techniques constitutes punishment with fifty-four percent of the Supremes disagreeing that it does not constitute punishment. Thirty-seven percent of the Supremes signal the techniques do not constitute punishment, and nine percent signal neutrality. The data also shows that coercive interrogation techniques constitute punishment, even when no other method would work quickly enough to be effective with forty-five percent of the Supremes disagreeing that it does not constitute punishment, twenty-seven agreeing that it does and twenty-seven signaling neutrality. Even so, forty-six percent signal that there is value in permitting coercive techniques, but only when the value of the information sought is great, thirty-six percent disagree and eighteen percent signal neutrality.

When asked “what is your understanding of coercive interrogation techniques” and about the need to gather intelligence from foreign and domestic sources, the Chief Justice responded:

Well, I suppose that to define it, one would say that a coercive interrogation technique would be a technique, which is designed to obtain information through the use of force or the threat of force, or torture or the threat of torture. And that it is a form of interrogation that has been widely used throughout the history of mankind, but which has generally been discouraged in the United States since 1966, since the *Miranda* decision . . . . There is a difference between using coercive techniques to avoid catastrophic disaster and attempting to build a case for prosecution

under the criminal law . . . if we are dealing with attempts to avoid catastrophic disaster we may have to relax some of the limitations on law enforcement personnel for survival . . . . respond[ing] to threats to national security intelligence is a vital element, we cannot defend ourselves without intelligence whether it is against a foreign threat or a domestic threat, if we are unable to gather intelligence we are in a sense fighting blindly and fighting blindly is equivalent perhaps to not fighting at all. Therefore, the gathering of intelligence both foreign and domestic is essential to the security of the nation. The methods of gathering that intelligence are of course subject to some restraint, including the Fourth and Fifth amendments, but consistent with those restraints I would think it appropriate for both the national government and state police organizations to gather all the intelligence that they possibly can in a legal manner that would tend to protect the state and the nation against violent terrorism and illegal actions . . . We must protect ourselves. We must preserve ourselves. But, in doing so we must go no further than the catastrophe requires. We cannot use [coercive interrogation] techniques capaciously, arbitrarily but only when they are absolutely necessary to our survival. The fact that we were champions of individual liberty, individual freedom and that we extended those freedoms to even aliens in our midst and to aliens who came under our control...now of course from time to time we deviated from that high moral status when we imprisoned the Japanese during World War II, thousands of Japanese were imprisoned without any basis other than ethnic or racial origin. We departed from those principles, certainly recently detaining people without proving that they are enemy combatants and where we do not have reasonable or probable cause to believe that they are enemy combatants.<sup>175</sup>

What clear signal does the data reveal? Preventing imminent catastrophe that threatens America's survival can *justify* use of coercive interrogation, but that does not necessarily mean its use is not cruel and unusual punishment. As importantly, indefinitely detaining human beings and routinely subjecting them to coercive interrogation techniques during a perpetual GWOT violates constitutionality protected liberty interests.

- Why should the public focus on the Supremes' signals concerning coercive interrogation and indefinite detention?

Eighty-two percent of the Supremes signal that modern terrorism may require they have an increased role in protecting liberties against government encroachment, and

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<sup>175</sup> Joseph R. Weisberger, Chief Justice (Ret.), The Rhode Island Supreme Court, interview with the author, July 17, 2008.

sixty-four percent agree intelligence information sharing among federal, state, local and tribal governments may increase the state judiciary's role in foreign and domestic security efforts.

Moreover, when asked to identify the most important factors necessary to consider when determining whether to grant a habeas petition of a suspected terrorist detainee, eight percent of the Supremes signaled that all factors provided in question 30 were the most important. That said, the Supremes identified citizenship as number one with twelve percent of the Supremes agreeing it was the most important factor to consider. Length of detainment, nationality, prisoner of war status, and whether the U.S. is engaged in a congressionally declared or authorized war all tied for second, with eleven percent agreeing these factors were most important to consider. Whether capture came about because of intelligence information sharing among federal, state, local and tribal governments came in third, with nine percent agreeing. Lastly, place of detainment and place of arrest came in fourth, with eight percent agreeing these factors were the most important.

Notwithstanding, the omnipresence of the Bush doctrine, ninety-one percent of the Supremes signal that unilateral action, by either political branch, authorizing public safety and security measures during the GWOT, violates constitutional principles of separation of powers. In addition, importantly, seventy-three percent signal that America's global image is a key factor to consider when weighing the competing interests, with eighteen percent disagreeing and nine percent signaling neutrality.

When asked, is there a connection between preserving the integrity of America's Constitution and improving the image of America globally, and what message America should impart to the world during the GWOT, the Chief Justices replied,

America has been described as a beacon on the hill just as the statute of liberty has been the emblem of a free state and a refuge from tyranny so, indeed, is our nations of laws and liberties a model for the world. It has been a model since its founding. Now, I cannot say that all people in all nations will love America because of its freedom and because of its idealism that has always been perhaps a dream that has never achieved full accomplishment. I think we were despised by imperial Japan. I think we were despised by the regime of Adolph Hilter. I think tyrants despised us

throughout our history. However most people and in most nations throughout the world respected America for her ideals and the purity of her motives. I believe that this characterization is part of our reputation part of our reason for being and is basic to our reputation throughout the world . . . . However devoted we are to our constitutional system of a republican government we must realize, of course that all peoples in all times do not necessarily agree with the principles of democracy or the principles that are embodied in our constitutional form of government. There have been and are nations who are ruled under monarchical principles or who are devoted to a system of government that for example may have a very strong mixture of religious dominance as opposed to separation of church and state. There are countries in which a religious influence is expected, taken for granted and highly prized. I will give you one historical example in our own country. Roger Williams was disdained by Massachusetts and Connecticut because he espoused religious tolerance. Massachusetts and Connecticut did not. The puritanical government in those two colonies absolutely considered tolerance to be a vice rather than a virtue. Now, there are some countries in the world today some of them devoted to Islamic law where a democracy such as ours would not be considered desirable, but government by clerics would be considered the ideal form of government. We have to respect those differences.<sup>176</sup>

The Chief Justice's America is a contextualized democracy. It respects human dignity, which as Power, West, Moghaddam, and Brzezinski offer, is essential to a sovereign's legitimacy and a public's freedom. What is the signal? If promoted with care, America's contextualized democracy is a model for combating the anti-American global political awakening and leading occupants on the ground floor of the staircase to terrorism off.

### **3. Legitimacy**

Judicial review serves to enhance the legitimacy of a state and to promote a contextualized democracy by upholding the rule of law, individual rights and freedoms with transparency. Judicial review is material and relevant to democracy's quest to reduce terrorism because it is a stabilizing force against tyranny.

Judicial review performed by an independent judiciary serves to promote a contextualized democracy, enhance a sovereign's legitimacy and reduce terrorism.

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<sup>176</sup> Joseph R. Weisberger, Chief Justice (Ret.), The Rhode Island Supreme Court, interview with the author, July 17, 2008.

Moghaddam observed that a contributing factor to terrorism is the exportation of a Western democracy that fails to speak to the “personal and collective identities and situations” of persons “on the ground floor of the staircase to terrorism.”<sup>177</sup> West on America’s history argued that the imposition of a de-contextualized democracy led to terrorism and war. Young America established a democracy that denied the human dignity of African Americans with “[t]wo hundred and forty-four years of slavery and nearly a century of institutionalized terrorism in the form of segregation, lynchings, and second-class citizenship in America.”<sup>178</sup> In failing to match its deeds to its values,<sup>179</sup> America’s democracy was illegitimate the result was war:

America denies its night side until it breaks right through. There’s no direct reference to slavery in the original U.S. Constitution. That’s not just a slight gesture. That’s lying. You can’t get away with that. You end up fighting a civil war over an institution not invoked in the Constitution. That’s a level of denial that’s incredibly deep. You think you’re innocent, yet you’ve created the catastrophe right in your midst. You try to sanitize and sterilize it so expertly that you think the funk is not going to hunt you down. But it never works.<sup>180</sup>

Similarly, the Bush doctrine,<sup>181</sup> however well-intended, created a catastrophic funk that smells globally, and will take years to clean up.<sup>182</sup> Fortunately, the clean up appears on the horizon under the leadership and vision of President Barack Obama.<sup>183</sup> Also, just as judicial review played a key role in eliminating the stench of America’s

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<sup>177</sup> Moghaddam, *From the Terrorists’ Point of View: What they Experience and Why They Come to Destroy*, 45-46, 134-135.

<sup>178</sup> Cornel West, *Race Matters* (Boston: MA: Beacon Press, 1993), 123.

<sup>179</sup> Leffler and. Legro, “Dilemmas of Strategy,” in *To Lead the World: American Strategy after the Bush Doctrine*, 263.

<sup>180</sup> Cornel West, *Hope on a Tightrope: Words & Wisdom Cornel West*, 14-15.

<sup>181</sup> Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*, 1-10; Power, “Legitimacy and Competence” in *To Lead the World: American Strategy after the Bush Doctrine*, 141-142.

<sup>182</sup> See David M. Kennedy, “Two Concepts of Sovereignty,” in *To Lead the World: American Strategy after the Bush Doctrine*, 157, 168 arguing “We and the World Will Be a Long Time Repairing the Damage Done by [Bush’s] Reckless Caesarism; Andrew Kohut and Bruce Stokes, *America against the World: How We Are Different and Why We Are Disliked* (New York: NY Times Books, 2006).

<sup>183</sup> See, President Barack Obama’s Inaugural Address Following is the transcript of President Barack Obama’s Inaugural Address, as transcribed by CQ Transcriptions, <http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html> (accessed January 27, 2008).

terrorism against blacks; it is at the ready to uphold the rule of law, acknowledging rights (even of America's suspected enemies)<sup>184</sup> to protect individual freedom of the dichotomous self/other and to foster a more perfect Union. Chief Justice Weisberger reminds us how judicial review promoted and preserved human dignity and that where it was lacking murderous chaos ensued:

If it had not been for judicial review equal rights would not have been given in the old states of the confederacy to African Americans in regard to education voting and other basic rights of citizenship . . . .

The Reichstag was not subject to any judicial review. Whatever the Reichstag voted was the law of Germany and you know what the Reichstag did. It established a dictatorship that was; I suppose you might say, was one of the horrible examples of tyranny, terrorism, and despotism.<sup>185</sup>

Clearly, then judicial review is an inherent part of and inextricably linked to the success of the American democratic experiment; put another way, judicial review has served a legitimating function in America's democracy. By ensuring that government deeds are matched to human dignity, judicial review guards against tyranny and demonstrates its materiality (pertinence and necessity) and relevancy (germaneness) to democracy's quest to reduce terrorism because it offers an alternative process for an aggrieved public, who might otherwise take up the sword against their government, to peaceably petition their government for redress.

Researchers who authored "More Freedom, Less Terror" show how "legitimacy brought about through liberalization measures," measures permitting persons to participate legally in the political process,<sup>186</sup> "can have a positive effect on reducing

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<sup>184</sup> Judge Richard M. Urbina, ordered the release of 17 detainees held at Guantanamo Bay Cuba, William Glaberson, "Judge Orders 17 Detainees at Guantanamo Freed," *New York Times*, October 7, 2008, [http://www.nytimes.com/2008/10/08/washington/08detain.html?\\_r=1&scp=6&sq=guantanamo%20bay%20federal%20court&st=cse](http://www.nytimes.com/2008/10/08/washington/08detain.html?_r=1&scp=6&sq=guantanamo%20bay%20federal%20court&st=cse) (accessed January 26, 2009); U.S. Supreme Court Line of Enemy Combatant Cases supra fn 7.

<sup>185</sup> Joseph R. Weisberger, Chief Justice (Ret.), The Rhode Island Supreme Court, interview with the author, October 15, 2008.

<sup>186</sup> Kaye et al., "More Freedom, Less Terror? Liberalization and Political Violence in the Arab World," 163.



support for political violence”, on terrorism in regions where terrorists originate.<sup>187</sup> Also, importantly, how judicial oversight, judicial review, performed by an independent judiciary, guards against tyranny and promotes government legitimacy, the public’s belief in the system’s ability to uphold the rule of law, to address concerns, to redress grievances over human rights, freedom of the press, speech and other liberties.<sup>188</sup> They warn, however, that “eroding legitimacy” by instituting cosmetic reforms and backtracking on political reforms designed to provide political access and protect individual freedoms, in regions where terrorists originate, raises the potential for increased violent extremism.<sup>189</sup> Correspondingly, scholars warn that America’s global legitimacy has been eroded in part as a result of the Bush Doctrine, “lauding reform solely on the basis of elections”<sup>190</sup> and with legislative branch support, constraining judicial review of security measures implemented in the name of the GWOT,<sup>191</sup> chief among them denial of habeas corpus.<sup>192</sup> There is a call for more research on “how precisely lack of legitimacy and anti-Americanism have hurt U.S. diplomacy and how rectifying past mistakes in these matters would produce more good than harm.”<sup>193</sup>

Similarly, although this thesis advocates for a public discourse that transcends the debate over whether judicial review is democratically illegitimate, it suggests there is a relationship between the argument espoused by non-judicial review theorists that judicial

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<sup>187</sup> Ibid., Regions researched included: Egypt, Jordan, Bahrain, Saudi Arabia, Algeria and Morocco.

<sup>188</sup> Ibid., 167-171, 174-175; Law, in “A Theory of Judicial Power and Judicial Review,” explaining that “courts can coordinate popular action against usurping governments by generating common beliefs and common knowledge about both the constitutionality of government conduct and the ways in which other citizens will react,” 10.

<sup>189</sup> Kaye et al., “More Freedom, Less Terror? Liberalization and Political Violence in the Arab World,” “the lack of legitimacy stemming from undeveloped [liberalization] measures and associated rights or, [] the reversal of even limited gains, increases the appeal of extremist groups,” 167-171, 174-175.

<sup>190</sup> Ibid., 174-175; Moghaddam’s discussion of free and fair elections that elect despots and tyrants, Moghaddam, *From the Terrorists’ Point of View: What they Experience and Why they Come to Destroy*, 129-130, 132-135.

<sup>191</sup> Leffler and Legro, Dilemmas of Strategy,” in *To Lead the World: American Strategy after the Bush Doctrine*, 141, 262-270.

<sup>192</sup> Power, “Legitimacy and Competence” in *To Lead the World: American Strategy after the Bush Doctrine*, 141.

<sup>193</sup> Leffler and Legro, Dilemmas of Strategy,” in *To Lead the World: American Strategy after the Bush Doctrine*, 274.

review is democratically illegitimate, the Bush Doctrine and the anti-American global political awakening, which can harm U.S. efforts to promote a contextualized democracy. Democracy, which research suggests, “pressing ahead with genuine democratization, not just limited reforms, may stem extremism over time by bolstering the legitimacy of weak and vulnerable regimes” in regions where terrorist originate.<sup>194</sup>

What is needed, then, is more research not on whether judicial review is democratically illegitimate, but rather whether the argument that it is, fueled the Bush Doctrine, which in turn, eroded U.S. legitimacy and fed anti-American sentiment inherent in the global political awakening’s<sup>195</sup> lust for terrorism. Understanding whether and how the argument damaged the legitimizing effects of judicial review to the detriment of democracy promotion and counterterrorism strategies, would further advance a post-counter-majoritarian discussion about judicial review’s materiality and relevancy to democracy’s quest to reduce terror.

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<sup>194</sup> Kaye et al., “More Freedom, Less Terror? Liberalization and Political Violence in the Arab World,” 172-174.

<sup>195</sup> This anti-American global politically awakening is arguably reflected in the waning of foreign reliance on rulings of American justices. Adam Lipstick, “U.S. Court Is Now Guiding Fewer Nations,” *New York Times*, September 18, 2008.

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## **APPENDIX. SURVEY BALANCING COMPETING INTERESTS OF CIVIL LIBERTIES AND PUBLIC SAFETY/SECURITY MEASURES IN TIMES OF NATIONAL EMERGENCIES**

For purposes of the below survey, national emergency means the global war on terror sparked by the September 11, 2001 terror attacks. Civil liberties refer to the protections afforded by the federal and state Constitutions designed to maintain freedom from coercive governmental actions. Public safety/security measures are governmental acts designed to secure the United States against real and/or imagined threats to the Nation.

### **I am of the view that:**

1. The integrity of the Constitution (federal and/or state) is paramount when weighing the competing interests of civil liberties and public safety/security measures during times of national emergencies

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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2. An essential element to consider when balancing the competing interests of civil liberties and public safety/security measures during times of national emergencies is whether alternative less harmful (to liberty) public safety/security measures may be implemented

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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3. An essential element to consider when balancing the competing interests of civil liberties and public safety security measures during times of national emergencies is whether sufficient time has passed to determine whether the public safety/security measure has served to reduce the terror threat

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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4. During times of national emergencies, civil liberties should yield in favor of public safety/security measures

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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5. During times of national emergencies, civil liberties must yield in favor of public safety/security measures

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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6. It is essential that Congress and the Executive Branch act in concert in authorizing public/safety security measures during times of national emergencies

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
-------------------	----------	---------	-------	----------------

7. America's image globally is a key factor to consider when weighing the competing interests of civil liberties and public safety/security measures during times of national emergencies

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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8. Public safety/security measures must increase as the terror threat increases

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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9. There is value in conferring constitutional rights on known terrorists

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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10. There is value in conferring constitutional rights on known terrorists only if they are citizens of the United States

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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11. There is value in conferring constitutional rights on suspected terrorists

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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12. There is value in conferring constitutional rights on suspected terrorists only if they are citizens of the United States

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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13. There is value in conferring constitutional rights on suspected terrorists only to protect the innocent

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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14. There is value in conferring constitutional rights on known terrorists only to protect the innocent

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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15. There is value in permitting indefinite detention of U.S. citizens suspected of terrorism without requiring proof beyond a reasonable doubt that the suspect really is a terrorist

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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16. There is value in permitting indefinite detention of U.S. citizens suspected of terrorism so long as there is a persuasive showing before a judge in an adversary hearing that the suspect really is a terrorist

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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17. There is value in permitting indefinite detention of non-U.S. citizens suspected of terrorism so long as there is a persuasive showing before a judge in an adversary hearing that the suspect really is a terrorist

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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18. There is value in permitting indefinite detention of non-U.S. citizens suspected of terrorism without requiring proof beyond a reasonable doubt that the suspect really is a terrorist

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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19. Modern terrorism--the September 11, 2001, terror attacks, expanded the conventional definition of war

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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20. Modern terrorism--the September 11, 2001, terror attacks requires the modification of the ordinary processes of criminal law and procedure

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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21. Modern terrorism--the September 11, 2001, terror attacks requires the modification of the ordinary processes of Constitutional law

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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22. A response to modern terrorism—the September 11, 2001, terror attacks requires as a matter of policy racial and/or ethnic profiling

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
-------------------	----------	---------	-------	----------------

23. Coercive interrogation techniques do not constitute punishment during times of national emergencies

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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24. There is value in permitting coercive interrogation techniques during times of national emergencies only when the value of information sought is great

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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25. Coercive interrogation techniques during times of national emergencies do not constitute punishment only when no other method would work quickly enough to be effective

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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26. A response to modern terrorism—the September 11, 2001 terror attacks can require as a matter of policy clandestine surveillance of non-U.S. citizens

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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27. A response to modern terrorism—the September 11, 2001 terror attacks can require clandestine surveillance of U.S. citizens only as a matter of law

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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28. Modern terrorism may require the States' judiciary as "independent tribunals of justice" to serve an increased role against the "assumption of power in the legislative or executive branch. . . to resist every encroachment upon rights expressly stipulated in the constitution by the declaration of rights"

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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29. The State's judiciary may have a critical role in national security measures or more precisely homeland defense and security because the National Strategy for Information Sharing of 2007 strongly encourages federal, state, local and tribal governments to share intelligence information relating to terrorist activity

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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30. Please check the most important factor(s) that you believe are necessary to consider when determining whether to grant a habeas petition of a suspected terrorist detainee during times of national emergency.

- ☐ Citizenship
- ☐ Place of detainment
- ☐ Length of detainment
- ☐ Nationality
- ☐ Place of arrest
- ☐ Prisoner of War status
- ☐ Whether the U.S. is engaged in a congressionally authorized war
- ☐ Whether the U.S. is engaged in a congressionally declared war
- ☐ Whether capture was pursuant to intelligence information sharing among federal, state, local or tribal governments
- ☐ All of the above
- ☐ Other please explain:



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